No. 16-1495	
Title:	**City of Hays, Kansas, Petitioner** **v.** **Matthew Jack Dwight Vogt**
Docketed:	June 15, 2017
Linked with 16A996	
Lower Ct:	United States Court of Appeals for the Tenth Circuit
Case Numbers:	(15-3266)
Decision Date:	January 4, 2017
Rehearing Denied:	January 30, 2017
Questions Presented	

DATE	**PROCEEDINGS AND ORDERS**
Apr 10 2017	Application (16A996) to extend the time to file a petition for a writ of certiorari from April 30, 2017 to June 29, 2017, submitted to Justice Sotomayor.
Apr 21 2017	Application (16A996) granted by Justice Sotomayor extending the time to file until June 29, 2017.
Jun 13 2017	Petition for a writ of certiorari filed. (Response due July 17, 2017)
Jun 29 2017	Order extending time to file response to petition to and including August 16, 2017.
Aug 16 2017	Brief of respondent Matthew Jack D. Vogt in opposition filed.
Aug 23 2017	Reply of petitioner City of Hays, Kansas filed.
Aug 30 2017	DISTRIBUTED for Conference of 9/25/2017.
Sep 28 2017	Petition GRANTED. Justice Gorsuch took no part in the consideration or decision of this petition.
Oct 02 2017	Motion to dispense with printing the joint appendix filed by petitioner.

Oct 31 2017	Blanket Consent filed by Petitioner, City of Hays, Kansas
Nov 02 2017	Blanket Consent filed by Respondent, Matthew Jack D. Vogt.
Nov 06 2017	Motion to dispense with printing the joint appendix filed by petitioner GRANTED. Justice Gorsuch took no part in the consideration or decision of this motion.
Nov 13 2017	Brief of petitioner City of Hays, Kansas filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2017	Brief amicus curiae of United States filed. **Proof of Service** **Main Document**
Nov 20 2017	Brief amicus curiae of State and Local Government Employers filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2017	Brief amici curiae of The State of Kansas and 12 Other States filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2017	Brief amicus curiae of Criminal Justice Legal Foundation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 11 2017	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service** **Main Document**
Dec 13 2017	Brief of respondent Matthew Jack D. Vogt filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 20 2017	SET FOR ARGUMENT ON Tuesday, February 20, 2018
Dec 20 2017	Brief amicus curiae of Criminal Procedure Scholars filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Dec 20 2017	Brief amici curiae of American Federation of Government Employees and American Federation of Teachers filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 20 2017	Brief amicus curiae of National Fraternal Order of Police filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 20 2017	Brief amici curiae of National Association of Criminal Defense Lawyers and American Civil Liberties Union filed. **Main Document** **Certificate of Word Count** **Proof of Service**

Jan 05 2018	CIRCULATED
Jan 08 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Gorsuch took no part in the consideration or decision of this motion.
Jan 08 2018	Reply of petitioner City of Hays, Kansas filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 10 2018	Record requested from the U.S.C.A. 10th Circuit.
Jan 12 2018	The entire record from the U.S.C.A. 10th Circuit is electronic and located on PACER.
Feb 01 2018	The record received from the U.S.D.C. District of Kansas is electronic.
Feb 20 2018	Argued. For petitioner: Toby J. Heytens, Charlottesville, Va.; and Elizabeth B. Prelogar, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Kelsi B. Corkran, Washington, D. C.

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RECORD AND BRIEFS

No. 16-1495

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

CITY OF HAYS, KANSAS, PETITIONER

v.

MATTHEW JACK DWIGHT VOGT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Self-Incrimination Clause provides that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." As the court below recognized, a "circuit split [has] developed" over whether certain pretrial uses of compelled statements force a person "to be a witness against himself" within the meaning of that provision. Pet. App. 6a. The question presented is:

Whether the Fifth Amendment is violated when statements are used at a probable cause hearing but not at a criminal trial.

PARTIES TO THE PROCEEDINGS

Petitioner, the City of Hays, Kansas, was a defendant–appellee in the court below.

Respondent Matthew Jack Dwight Vogt was the plaintiff–appellant in the court below.

The City of Haysville, Kansas, Don Scheibler, Jeff Whitfield, Kevin Sexton, and Brandon Wright are not parties in this Court but were defendants–appellees in the court below.

TABLE OF CONTENTS

Question presented I
Parties to the proceedings II
Table of authorities IV
Opinions below 1
Jurisdiction 1
Constitutional provision involved 1
Statement 1
A. Factual background 1
B. Procedural background 3
Reasons for granting the petition 4
A. This case deepens an acknowledged and entrenched conflict 5
B. The decision below is wrong 10
C. This issue is important and recurring ... 12
D. This case presents a clean vehicle 14
Conclusion 15
Appendix A — Court of appeals opinion (Jan. 4, 2017) 1a
Appendix B — District court opinion (Sept. 30, 2015) 35a
Appendix C — Order denying rehearing (Jan. 30, 2017) 45a
Appendix D — Complaint 46a

TABLE OF AUTHORITIES

Cases

Arizona v. *Fulminante*, 499 U.S. 279 (1991) 14

Arnett v. *Kennedy*, 416 U.S. 134 (1974) 12

Best v. *City of Portland*, 554 F.3d 698 (7th Cir. 2009) 8

Bowman v. *Mann*, No. 315CV521, 2016 WL 6093489 (E.D. Va. Oct. 18, 2016) 9

Brooks v. *Luther*, No. 15-CV-6707 (JBS-KMW), 2017 WL 626711 (D.N.J. Feb. 15, 2017) 9

Brown v. *SEPTA*, 539 Fed. Appx. 25 (3d Cir. 2013) 8

Burrell v. *Virginia*, 395 F.3d 508 (4th Cir. 2005) 7

Busick v. *Neal*, 380 Fed. Appx. 392 (5th Cir. 2010) 8–9

Chavez v. *Martinez*, 538 U.S. 760 (2003) ..... passim

Crowe v. *Cty. of San Diego*, 608 F.3d 406 (9th Cir. 2010), cert. denied, 562 U.S. 1135 (2011) 9

Garrity v. *New Jersey*, 385 U.S. 493 (1967) . 2

Hall v. *Idaho Dep't of Fish and Game*, No. 2:11–cv–00622, 2013 WL 2458537 (D. Idaho June 6, 2013) 10

Higazy v. *Templeton*, 505 F.3d 161 (2d Cir. 2007) 7, 8

Hurt v. *Vantlin*, No. 3:14–cv–00092–JMS–MPB, 2017 WL 1021396 (S.D. Ind. Mar. 16, 2017) 10

Jackson v. *Denno*, 378 U.S. 368 (1964) 13

Kenney v. *Clay*, 172 F. Supp. 3d 628 (N.D.N.Y. 2016) 9

Lafler v. *Cooper*, 566 U.S. 156 (2012) 13

Lawn v. *United States*, 355 U.S. 339 (1958) 11

Murray v. *Earle*, 405 F.3d 278 (5th Cir. 2005) 6, 11

Owen v. City of Independence, 445 US 622 (1980) 13

Renda v. *King*, 347 F.3d 550 (3d Cir. 2003). 6

Rodenbaugh v. *Santiago*, No. 16-CV-2158, 2017 WL 194238 (E.D. Pa. Jan. 18, 2017) 9

Saunders v. *City of Chi.*, No. 12–cv–09158, 2013 WL 6009933 (N.D. Ill. Nov. 13, 2013) 9–10

Schneckloth v. *Bustamonte*, 412 U.S. 218 (1973) 14

Smart v. *United States*, No. EP–10–CV–253–PRM, 2010 WL 4929107 (W.D. Tex. Nov. 30, 2010) 9

Smith v. *Jerrome*, No. 3:13-CV-544, 2015 WL 1349661 (E.D. Va. Mar. 24, 2015).... 9

Smith v. *Patterson*, 430 Fed. Appx. 438 (6th Cir. 2011)..... 7

Sornberger v. *City of Knoxville*, 434 F.3d 1006 (7th Cir. 2006)..... 8

State v. *Mems*, 708 N.W.2d 526 (Minn. 2006)..... 7

Stoot v. *City of Everett*, 582 F.3d 910 (9th Cir. 2009)..... 8

Thomsen v. *City of New York*, 15cv2668 (DLC), 2016 WL 590235 (S.D.N.Y. Feb. 11, 2016)..... 10

Tinker v. *Beasley*, 429 F.3d 1324 (11th Cir. 2005)..... 7

United States v. *Calandra*, 414 U.S. 338 (1974)..... 11

United States v. *Hubbell*, 530 U.S. 27 (2000)..... 10, 11

United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990)..... 10

United States v. *Williams*, 504 U.S. 36, 52 (1992)..... 12

Vicknari v. *La. Dep't of Wildlife and Fisheries*, No. 6:11–CV–184, 2013 WL 1180834 (W.D. La. Jan. 29, 2013..... 9

Winslow v. *Smith*, 696 F.3d 716 (8th Cir. 2012)..... 7

Withrow v. *Williams*, 507 U.S. 680 (1992). 10

Constitutional Provisions

U.S. Const. amend. V 5

Statutes and Rules

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... 3, 5

Kan. Stat. Ann. § 22–2902(1) 2

Miscellaneous

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The opinion of the court of appeals (Pet. App. 1a–34a) is reported at 844 F.3d 1235. The district court's Memorandum and Order (Pet. App. 35a–44a) is unpublished but is available at 2015 WL 5730331.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 2017. A petition for rehearing was denied on January 30, 2017 (Pet. App. 45a). On April 21, 2017, Justice Sotomayor extended the time in which to file a petition for a writ of certiorari to and including June 29, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person * * * shall be compelled in any criminal case to be a witness against himself."

STATEMENT

A. Factual background

Petitioner is a city in Kansas; respondent is one of its former police officers. Pet. App. 47a. In 2013, while still employed by petitioner, respondent applied for a job with the police department in a different city. *Id.* at 48a. During an interview for that position, respondent revealed that "he had kept a knife for his personal use after coming into possession of it while working as a * * * police officer [for petitioner]." *Ibid.* The interviewing department extended respondent a job offer conditioned on respondent telling petitioner about the knife and returning it. *Id.* at 48a–49a.

Respondent told petitioner's chief of police about the knife. Pet. App. 49a. The chief directed respondent

to provide additional information and opened an internal investigation. *Ibid.* Respondent gave the chief a "vague one-sentence report related to his possession of the knife" and submitted his two weeks' notice of resignation. *Ibid.*[1] The lieutenant in charge of internal investigations asked respondent to provide additional information. *Ibid.* Respondent then made a further statement, which included "the type of police call [respondent] was handling when he came into possession of the knife." *Ibid.* Using this information, the lieutenant was able to locate "an audio recording which captured the circumstances of how [respondent] came into possession of the knife." *Id.* at 50a. At that point, the chief terminated the internal investigation, and gave respondent's statements and the resulting information to the Kansas Bureau of Investigation. *Ibid.* Because respondent had become the subject of a criminal investigation, the other city's police department withdrew its job offer. *Ibid.*

The State of Kansas (which is not a party to this case) later charged respondent with two felony counts related to the knife. Pet. App. 50a. Under state law, respondent was entitled to a probable cause hearing. Kan. Stat. Ann. § 22–2902(1). Respondent alleges that, at this hearing, his statements about the knife and the resulting information were "used against him." Pet.

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[1] According to respondent, this statement was "compelled" because the chief told respondent he would lose his job unless he provided additional information about the knife. Pet. App. 49a; see generally *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967) (holding statements "obtained under threat of removal from office" are compelled statements for purposes of the Self-Incrimination Clause).

App. 50a.[2] A state district court judge dismissed both charges based on lack of probable cause. *Ibid.*

B. Procedural background

1. Following dismissal of all criminal charges against him, respondent sued petitioner, the city with which he had sought employment, and four individual officers. Pet. App. 46a–54a. Respondent alleged that the defendants were liable under 42 U.S.C. § 1983 for violating his Fifth Amendment rights. *Id.* at 1a. Specifically, respondent alleged that: (1) by threatening to terminate his employment if he did not provide additional statements about the knife, the defendants compelled him to make incriminating statements; and (2) those statements were used against him in a criminal case when they were used at the probable cause hearing. *Ibid.*

The defendants (including petitioner) moved to dismiss respondent's complaint for failure to state a claim. Pet. App. 35a. The district court granted that motion, reasoning that because "the compelled statements were never introduced against [respondent] at trial," respondent "fail[ed] to state a violation of his Fifth Amendment rights." *Id.* at 43a–44a.

2. The Tenth Circuit affirmed in part and reversed in part. Pet. App. 1a–34a. The court affirmed the dismissal of respondent's claims against the four individual officers based on qualified immunity. *Id.* at 2a. The

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[2] Because respondent appealed a dismissal for failure to state a claim, the courts below were required to "credit the factual allegations in the complaint." Pet. App. 2a. Respondent's complaint is reproduced at Pet. App. 46a–54a.

court also affirmed the dismissal of respondent's claim against the other city because that city had not compelled respondent to incriminate himself. *Ibid.* But unlike the district court, the Tenth Circuit concluded that respondent had stated a valid Fifth Amendment claim against petitioner, the municipality that had employed him. *Ibid.*

The key question in this case, the Tenth Circuit recognized, is whether using a compelled statement at a probable cause hearing implicates the Fifth Amendment's Self-Incrimination Clause. The court of appeals determined it does. The Tenth Circuit noted that this Court's most recent Self-Incrimination Clause decision reserved judgment about "the precise moment when a 'criminal case' commences" for Fifth Amendment self-incrimination purposes. Pet. App. 22a (quoting *Chavez* v. *Martinez*, 538 U.S. 760, 769 (2003) (opinion of Thomas, J.)). The Tenth Circuit also acknowledged that, "[f]ollowing *Chavez*, a circuit split developed over the definition of a 'criminal case' under the Fifth Amendment." *Id.* at 6a. Ultimately, however, the court of appeals concluded that: (1) "the right against self-incrimination is more than a trial right," *id.* at 10a; and (2) the "Fifth Amendment is violated when criminal defendants are compelled to incriminate themselves and the incriminating statement is used in a probable cause hearing," *id.* at 2a.

REASONS FOR GRANTING THE PETITION

This case presents a significant and recurring question of constitutional law on which the lower courts are sharply divided: Is the Fifth Amendment violated when compelled statements are used at a probable

cause hearing but never at a criminal trial? Four circuits and one state supreme court have held that a person has not been "compelled * * * to be a witness against himself," U.S. Const. amend. V, unless and until compelled statements are used at a criminal trial. In contrast, four other circuits—including the court below—have held that the Self-Incrimination Clause is violated by any use of compelled statements at certain pretrial hearings. Federal constitutional rights should not vary by geography. Nor should a municipality's exposure to liability under 42 U.S.C. § 1983. This case presents a clean vehicle for resolving an entrenched conflict and warrants this Court's review.

A. This case deepens an acknowledged and entrenched conflict

The Self-Incrimination Clause provides that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In *Chavez* v. *Martinez*, 538 U.S. 760 (2003), the plaintiff alleged that his Fifth Amendment rights were violated when a police officer interrogated him, even though no criminal prosecution was ever initiated. *Chavez*, 538 U.S. at 764–765 (opinion of Thomas, J.). The Ninth Circuit found that the officer's "coercive questioning" of the plaintiff, in and of itself, "violated his Fifth Amendment rights." *Id.* at 765 (opinion of Thomas, J.). This Court reversed. Although there was no opinion for the Court, a majority of Justices concluded that there had been no violation of the Self-Incrimination Clause under the circumstances of that case. *Id.* at 763 (opinion of Thomas, J.); *id.* at 777 (Souter, J., concurring in the judgment). As a result,

the Court found it unnecessary to determine "the precise moment when a 'criminal case' commences" for purposes of the Fifth Amendment Self-Incrimination Clause." *Id.* at 767 (opinion of Thomas, J.).

Since *Chavez*, a widely acknowledged split has developed in the lower courts about whether various pretrial uses of allegedly compelled statements implicate the Self-Incrimination Clause.

1. Four circuits and one state supreme court have held that "[t]he Fifth Amendment privilege against self-incrimination is a fundamental *trial* right which can be violated only at *trial*." *Murray* v. *Earle*, 405 F.3d 278, 285 (5th Cir. 2005) (emphasis added).

In *Renda* v. *King*, 347 F.3d 550, 552 (3d Cir. 2003), for example, state troopers had interrogated the plaintiff without providing *Miranda* warnings. Based on her answers, the plaintiff was charged with making a false report to a law enforcement officer. *Id.* at 553, 558. At a preliminary hearing, the plaintiff's answers were suppressed and all charges were dropped. *Ibid.* The plaintiff then filed suit, alleging that the troopers violated her Fifth Amendment right against self-incrimination. *Id.* at 553. The Third Circuit affirmed the district court's dismissal of the plaintiff's claim. "[A]s long as the plaintiff's statements are not used against her at trial," the court held, "questioning a plaintiff in custody without providing *Miranda* warnings is not a basis for a § 1983 claim." *Id.* at 557–558. "[I]t is the use of coerced statements *during a criminal trial*, and not in obtaining an indictment," the Third Circuit held, "that violates the Constitution." *Id.* at 559 (emphasis added).

The Fourth Circuit's decision in *Burrell* v. *Virginia*, 395 F.3d 508 (4th Cir. 2005), is similar. In that case, the plaintiff alleged that city officials violated the Fifth Amendment by summoning him to court because he refused to provide proof of insurance after a car accident. *Id.* at 510. Because the plaintiff did "not allege any *trial* action that violated his Fifth Amendment rights," the Fourth Circuit held, "his claim fails." *Id.* at 514.

Other courts have reached the same conclusion. In *Winslow* v. *Smith*, for example, the Eighth Circuit concluded that the plaintiffs' self-incrimination claims failed "because Plaintiffs *did not proceed to a criminal trial*." 696 F.3d 716, 731 n.4 (8th Cir. 2012) (emphasis added); accord *Tinker* v. *Beasley*, 429 F.3d 1324, 1328 n.7 (11th Cir. 2005) ("[T]he Self-Incrimination Clause in the Fifth Amendment is not violated *until* a compelled statement has been used in a criminal trial or proceeding."); *State* v. *Mems*, 708 N.W.2d 526, 534 (Minn. 2006) ("Even assuming appellant's police statement was obtained in violation of *Miranda*, there was no Fifth Amendment violation where his statement was not admitted at trial."); see also *Smith* v. *Patterson*, 430 Fed. Appx. 438, 441 (6th Cir. 2011) ("[W]hen the government does not try to admit the confession *at a criminal trial*, the Fifth Amendment plays no role.") (emphasis added).

2. In contrast, the Second, Seventh, Ninth, and now Tenth Circuits have determined that "a coerced statement d[oes] not have to be introduced at trial to violate a plaintiff's Fifth Amendment rights." *Higazy* v. *Templeton*, 505 F.3d 161, 171 (2d Cir. 2007). In these courts' view, the Fifth Amendment also is violated

when compelled statements are used at various pretrial proceedings, including: (a) bail hearings, see *Higazy*, 505 F.3d at 173; (b) suppression hearings, see *Best* v. *City of Portland*, 554 F.3d 698, 702–703 (7th Cir. 2009); (c) bail hearings, arraignments, and probable cause hearings, see *Sornberger* v. *City of Knoxville*, 434 F.3d 1006, 1026–1027 (7th Cir. 2006); (d) affidavits supporting charging information, arraignments, and bail hearings, see *Stoot* v. *City of Everett*, 582 F.3d 910, 925 (9th Cir. 2009); and, now (e) probable cause hearings, Pet. App. 2a.

3. All of the decisions cited above post-date *Chavez* and a number of them specifically cite *Chavez*'s failure to identify when a "criminal case" begins as a source of difficulty. See, *e.g.*, *Sornberger*, 434 F.3d at 1026 ("*Chavez*, of course, did not determine whether pretrial proceedings such as these fall within the scope of a 'criminal case' for purposes of the Self–Incrimination Clause."); Pet. App. 6a ("The *Chavez* Court did not decide the precise moment when a 'criminal case' commences." (citation omitted)).

4. The split is unlikely to resolve itself without this Court's intervention. The Tenth Circuit denied a petition for rehearing in this case, see Pet. App. 45a, and courts on both sides of the split have reaffirmed their position in recent decisions.[3] Within the Third, Fourth,

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[3] See, *e.g.*, *Brown* v. *SEPTA*, 539 Fed. Appx. 25, 28 (3d Cir. 2013) ("[The plaintiff] may not base a § 1983 claim for a violation of constitutional rights on the mere fact that the police questioned him in custody without providing *Miranda* warnings when there is no claim that [the plaintiff's] answers were used against him at trial.") (citing *Renda*); *Busick* v. *Neal*, 380 Fed. Appx. 392, 394

Fifth, and Eighth Circuits, district courts routinely apply the "trial only" construction to reject Fifth Amendment claims.[4] In contrast, district courts in the Second, Seventh, and Ninth Circuits have relied on those circuits' more expansive understanding of what qualifies as use in a "criminal case" in denying dispositive motions filed by defendants.[5]

(5th Cir. 2010) ("[T]he statement [the plaintiff] made to [the defendant] was not used against him at trial, and [the plaintiff] thus cannot raise a Fifth Amendment claim.") (citing *Murray*); *Crowe* v. *Cty. of San Diego*, 608 F.3d 406, 427 (9th Cir. 2010) (citing *Stoot* and applying its rationale to pre-trial juvenile offender hearings and grand jury proceedings), cert. denied, 562 U.S. 1135 (2011).

[4] See, *e.g.*, *Rodenbaugh* v. *Santiago*, No. 16-CV-2158, 2017 WL 194238, at *7 (E.D. Pa. Jan. 18, 2017) (citing *Renda* and rejecting a Fifth Amendment claim because the plaintiff failed to allege "that any [compelled] statement * * * was used against her at trial"); *Bowman* v. *Mann*, No. 315CV521, 2016 WL 6093489, at *3 (E.D. Va. Oct. 18, 2016) ("Here, [the plaintiff] 'does not allege any trial action that violated his Fifth Amendment rights; thus, ipso facto, his claim fails.'") (emphases omitted) (citing *Burrell*); *Vicknari* v. *La. Dep't of Wildlife and Fisheries*, No. 6:11–CV–184, 2013 WL 1180834, at *11 (W.D. La. Jan. 29, 2013) ("Here, it is undisputed that the plaintiffs' confessions were never used against them at any criminal trial. Accordingly, the Fifth Amendment was not violated."); accord *Brooks* v. *Luther*, No. 15-CV-6707 (JBS-KMW), 2017 WL 626711, at *3 (D.N.J. Feb. 15, 2017); *Smith* v. *Jerrome*, No. 3:13-CV-544, 2015 WL 1349661, at *3 (E.D. Va. Mar. 24, 2015); *Smart* v. *United States*, No. EP–10–CV–253–PRM, 2010 WL 4929107, at *9 (W.D. Tex. Nov. 30, 2010).

[5] See, *e.g.*, *Kenney* v. *Clay*, 172 F. Supp. 3d 628, 640–641 (N.D.N.Y. 2016) (denying summary judgment where plaintiff's Fifth Amendment claim was based on the use of compelled statements at a preliminary bail hearing and grand jury proceeding); *Saunders* v. *City of Chi.*, No. 12–cv–09158, 2013 WL 6009933, at

B. The decision below is wrong

As this Court has explained, the shorthand phrase "'privilege against self-incrimination' is not an entirely accurate description of a person's constitutional protection against being 'compelled in any criminal case to be a witness against himself.'" *United States* v. *Hubbell*, 530 U.S. 27, 34 (2000). "Mere compulsion" does not violate the Self-Incrimination Clause. *Chavez*, 538 U.S. at 772-773 (opinion of Thomas, J.) Rather, the Self-Incrimination Clause is a "*trial* right." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 259 (1990) (emphasis added), and is violated only when a criminal defendant's compelled statements are used *at trial*.

1. This Court consistently has described the right against self-incrimination as a trial right. In *Verdugo-Urquidez*, for example, the Court stated that even when law enforcement officials compel defendants to make incriminating statements "a constitutional violation only occurs at trial." 494 U.S. at 264. Similarly, in *Withrow* v. *Williams*, 507 U.S. 680 (1992), the Court stated that the *Miranda* doctrine safeguards "a fundamental *trial* right." *Id.* at 691 (citation omitted); accord

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*4 (N.D. Ill. Nov. 13, 2013) ("[A] defendant is compelled to be witness against himself in violation of the Fifth Amendment when his unlawful confession is introduced at a pretrial proceeding."); *Hall* v. *Idaho Dep't of Fish and Game*, No. 2:11–cv–00622, 2013 WL 2458537, at *11 (D. Idaho June 6, 2013) (holding that plaintiff's Fifth Amendment claim accrued when his compelled statement was used at a probable cause hearing); accord *Thomsen* v. *City of New York*, 15cv2668 (DLC), 2016 WL 590235, at *9–*10 (S.D.N.Y. Feb. 11, 2016); *Hurt* v. *Vantlin*, No. 3:14–cv–00092–JMS–MPB, 2017 WL 1021396, at *16 (S.D. Ind. Mar. 16, 2017).

Chavez, 538 U.S. at 777 (Souter, J., concurring in the judgment) (stating that the Fifth Amendment "focuses on courtroom use of a criminal defendant's compelled, self-incriminating testimony").

2. Well-established features of this Court's jurisprudence support the same conclusion. For example, a criminal defendant cannot challenge an indictment on the theory that the grand jury considered his own compelled, incriminating statements. See *United States* v. *Calandra*, 414 U.S. 338 (1974); *Lawn* v. *United States*, 355 U.S. 339 (1958). This result is hard to explain if the Fifth Amendment is violated the moment a defendant's compelled statements are used during pretrial proceedings. But it makes perfect sense if "[t]he Fifth Amendment privilege against self-incrimination is a fundamental trial right which can be violated only *at* trial." *Murray*, 405 F.3d at 285.

3. The Fifth Amendment's text—particularly its use of the word "witness"—is consistent with this understanding of the Self-Incrimination Clause as fundamentally a trial right. At the time of the founding, "witness" meant "a person who gives or furnishes evidence." *Hubbell*, 530 U.S. at 50 (Thomas, J. concurring); accord Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857, 900 (1995) ("Witnesses are those who take the stand and testify, or whose out-of-court depositions or affidavits are introduced at trial in front of the jury.").

This understanding of "witness" in the Fifth Amendment also is consistent with the use and construction of that same word in the Sixth Amendment.

The Sixth Amendment guarantees criminal defendants the right to confront opposing "witnesses" and "to have compulsory process for obtaining witnesses in [their] favor." Both of these rights are exercised at trial. In fact, this Court has specifically rejected the claim that a criminal defendant has any right to confront the people who testify against her before a grand jury or to present her own witnesses. See *United States* v. *Williams*, 504 U.S. 36, 52 (1992) (stating that a target of a grand jury inquiry has no right "to tender his own defense").

C. This issue is important and recurring

"[T]he Government, as an employer, must have wide discretion and control over the management of its personnel." *Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974). Municipalities employ more than 14 million people, more than those employed by state and federal governments combined.[6] The roles of municipal employees are also more varied. Local governments employ teachers, fire fighters, police officers, correctional officers, nurses, and transportation workers.[7]

Unlike nearly all government employers and employees, however, municipalities are neither immune

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[6] Bureau of Labor Statistics, *The Employment Situation– February 2017*, Table B-1 Employees on nonfarm payrolls by industry sector and selected industry detail 31 (Feb. 2017) https://www.bls.gov/news.release/archives/empsit_03102017.pdf.

[7] Elizabeth McNichol, Center on Budget and Policy Priorities, *Some Basic Facts on State and Local Government Workers* (Jun. 15, 2012), http://www.cbpp.org/research/some-basic-facts-on-state-and-local-government-workers.

from suit nor eligible for a qualified immunity defense.[8] For that reason, it is especially important that municipal employers have clear guidance about the scope of their constitutional obligations. Local governments must be able to manage their employees and discharge those who betray the public trust.

Whether pretrial use of allegedly compelled statements implicates the Self-Incrimination Clause is especially significant because of the growing importance of pretrial proceedings. This Court has recognized "the reality that criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler* v. *Cooper*, 566 U.S. 156, 170 (2012).[9] The lower courts' different approaches, therefore, have the potential to impact a great many cases other than this one and create uncertainty for local governments.

This issue has particularly broad ramifications for law enforcement. An officer in the field does not always know whether a court will later determine that a statement was compelled. In fact, courts hold preliminary hearings to decide that very question. *Jackson* v. *Denno*, 378 U.S. 368 (1964). The problem is only compounded by the fact that Self-Incrimination Clause analysis often depends on the totality of the circumstances, including factors such as age, education, prior

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[8] See *Owen* v. *City of Independence*, 445 U.S. 622 (1980) (holding that municipalities, unlike individuals, are not entitled to a qualified immunity defense).

[9] See also Lindsey Devers, *Research Summary: Plea and Charge Bargaining*, Bureau of Justice Statistics 1 (2011) ("90 to 95 percent of both federal and state court cases are resolved through [pleas]"), https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf.

criminal experience, the manner of interrogation, and the existence of threats or inducement.[10] Officers—and the municipalities that employ them—cannot always predict whether their actions will be found to have violated the Fifth Amendment. As a result, it matters a great deal which uses of allegedly compelled statements do—and do not—expose municipalities to liability under Section 1983.

D. This case presents a clean vehicle

This case presents a clean vehicle for clarifying the meaning of the Fifth Amendment's Self-Incrimination Clause. There is no dispute about the jurisdiction of either lower court. Because this is an appeal from the grant of a motion to dismiss for failure to state a claim, there are no disputed factual questions. All relevant issues were raised and preserved on appeal. The case was litigated on the assumption that the statements were compelled, so the only question is whether the use of the incriminating statements at the probable cause hearing violated the Self-Incrimination Clause. There are no alternative grounds of decision to support the judgment. Eight circuits and one state supreme court have considered the single issue presented in this petition for a writ of certiorari, and the court below expressly acknowledged the conflict, see Pet. App. 6a. This conflict is fully developed, squarely presented, and free from any threshold questions. It warrants this Court's immediate review.

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[10] See *Arizona* v. *Fulminante*, 499 U.S. 279, 286 (1991); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 15-3266

MATTHEW JACK DWIGHT VOGT,
PLAINTIFF – APPELLANT

v.

CITY OF HAYS, KANSAS; CITY OF HAYSVILLE, KANSAS; DON SCHEIBLER; JEFF WHITFIELD; KEVIN SEXTON; BRANDON WRIGHT, DEFENDANTS – APPELLEES

Decided: January 4, 2017

Before: HARTZ, BACHARACH, and McHUGH, Circuit Judges.

BACHARACH, Circuit Judge:

Mr. Matthew Vogt alleges a violation of the Fifth Amendment through the compulsion to incriminate himself and the use of his compelled statements in a criminal case. Based on the alleged Fifth Amendment violation, Mr. Vogt invokes 42 U.S.C. § 1983, suing (1) the City of Hays, Kansas; (2) the City of Haysville, Kansas; and (3) four police officers. The district court dismissed the complaint for failure to state a claim, reasoning that

- the right against self-incrimination is only a trial right and

- Mr. Vogt's statements were used in pretrial proceedings but not in a trial.

We draw four conclusions:

1. The Fifth Amendment is violated when criminal defendants are compelled to incriminate themselves and the incriminating statement is used in a probable cause hearing.
2. The individual officers are entitled to qualified immunity.
3. The City of Haysville did not compel Mr. Vogt to incriminate himself.
4. Mr. Vogt has stated a plausible claim for relief against the City of Hays.

Accordingly, we (1) affirm the dismissal of the claims against the four police officers and Haysville and (2) reverse the dismissal of the claim against the City of Hays.

I. Mr. Vogt alleges that his compelled statements were used in a criminal case.

Because this appeal is based on a dismissal for failure to state a valid claim, we credit the factual allegations in the complaint. *Brown v. Montoya*, 662 F.3d 1152, 1162 (10th Cir. 2011).

Mr. Vogt was employed as a police officer with the City of Hays. In late 2013, Mr. Vogt applied for a position with the City of Haysville's police department. During Haysville's hiring process, Mr. Vogt disclosed that he had kept a knife obtained in the course of his work as a Hays police officer.

Notwithstanding this disclosure, Haysville offered the job to Mr. Vogt. But his disclosure about the knife led Haysville to make the offer conditional: Mr. Vogt could obtain the job only if he reported his acquisition

of the knife and returned it to the Hays police department. Two Haysville police officers said that they would follow up with Hays to ensure that Mr. Vogt complied with the condition.

Mr. Vogt satisfied the condition, reporting to the Hays police department that he had kept the knife. The Hays police chief reacted by ordering Mr. Vogt to submit a written report concerning his possession of the knife. Mr. Vogt complied, submitting a vague one sentence report. He then provided Hays with a two-week notice of resignation, intending to accept the new job with Haysville.

In the meantime, the Hays police chief began an internal investigation into Mr. Vogt's possession of the knife. In addition, a Hays police officer required Mr. Vogt to give a more detailed statement in order to keep his job with the Hays police department. Mr. Vogt complied, and the Hays police used the additional statement to locate additional evidence.

Based on Mr. Vogt's statements and the additional evidence, the Hays police chief asked the Kansas Bureau of Investigation to start a criminal investigation. In light of this request, the Hays police department supplied Mr. Vogt's statements and additional evidence to the Kansas Bureau of Investigation. The criminal investigation led the Haysville police department to withdraw its job offer.

Mr. Vogt was ultimately charged in Kansas state court with two felony counts related to his possession of the knife. Following a probable cause hearing, the state district court determined that probable cause was lacking and dismissed the charges.

This suit followed, with Mr. Vogt alleging use of his statements (1) to start an investigation leading to the

discovery of additional evidence concerning the knife, (2) to initiate a criminal investigation, (3) to bring criminal charges, and (4) to support the prosecution during the probable cause hearing. Mr. Vogt argues that these uses of his compelled statements violated his right against self-incrimination.

II. Standard of Review

We engage in de novo review of the district court's dismissal. *Mocek v. City of Albuquerque*, 813 F.3d 912, 921 (10th Cir. 2015). To survive the motion to dismiss, Mr. Vogt had to plead enough facts to create a facially plausible claim. *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012). The claim is facially plausible if Mr. Vogt pleaded enough factual content to allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

III. The Meaning of a "Criminal Case" Under the Fifth Amendment

The Fifth Amendment[11] protects individuals against compulsion to incriminate themselves "in any criminal case." U.S. Const. amend. V. This amendment prohibits compulsion of law enforcement officers to make self-incriminating statements in the course of employment. *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). As a law enforcement officer, Mr. Vogt enjoyed protection under the Fifth Amendment against use of his compelled statements in a criminal case.

The district court held that Mr. Vogt had not stated a valid claim under the Fifth Amendment because the incriminating statements were never used at trial. We

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[11] The Fifth Amendment applies to the states through incorporation of the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

disagree, concluding that the phrase "criminal case" includes probable cause hearings.

A. Our precedents provide conflicting signals on whether the term "criminal case" includes pre-trial proceedings as well as the trial.

The U.S. Supreme Court has not conclusively defined the scope of a "criminal case" under the Fifth Amendment. In dicta, the Supreme Court suggested in a 1990 opinion, *United States v. Verdugo-Urquidez*, that the right against self-incrimination is only a trial right. 494 U.S. 259, 264 (1990).

But the Supreme Court later appeared to retreat from that dicta. In *Mitchell v. United States*, for instance, the Court held that the right against self-incrimination extends to sentencing hearings. 526 U.S. 314, 320–21, 327 (1999). The Court reasoned that "[t]o maintain that sentencing proceedings are not part of 'any criminal case' is contrary to the law and to common sense." *Id.* at 327.

Even more recently, the Court again addressed the scope of the Fifth Amendment in *Chavez v. Martinez*, 538 U.S. 760 (2003). In *Chavez*, the plaintiff sued a police officer under § 1983, alleging coercion of self-incriminating statements in violation of the Fifth Amendment. 538 U.S. at 764–65. Writing for himself and two other justices, Justice Thomas concluded that (1) the plaintiff had failed to state a valid claim because he had not been charged with a crime and (2) the plaintiff's statements had not been used in a criminal case. *Id.* at 766.

Though the Court did not produce a majority opinion on the Fifth Amendment issue, Justice Thomas's plurality opinion explained that "mere coercion does not violate the text of the Self-Incrimination Clause

absent use of the compelled statements in a criminal case against the witness." *Id.* at 769. Justice Thomas added that "[a] 'criminal case' at the very least requires the initiation of legal proceedings." *Id.* at 766. Two other justices agreed with the outcome, reasoning that the Fifth Amendment's text "focuses on *courtroom use* of a criminal defendant's compelled, self-incriminating testimony." *Id.* at 777 (Souter, J., concurring in the judgment) (emphasis added).

The *Chavez* Court did not decide "the precise moment when a 'criminal case' commences." *Id.* at 766–67. Justice Thomas cited *Verdugo-Urquidez*, but apparently did not read it to limit the Fifth Amendment to use at trial. *See id.* at 767.

Three other justices stated that a violation of the Self-Incrimination Clause is complete the moment a confession is compelled. *Id.* at 795 (Kennedy, J., concurring in part and dissenting in part). Thus, even in light of *Verdugo-Urquidez*, these three justices concluded that the Fifth Amendment extended beyond use of a compelled statement at trial. *Id.* at 792.

Following *Chavez*, a circuit split developed over the definition of a "criminal case" under the Fifth Amendment. The Third, Fourth, and Fifth Circuits have stated that the Fifth Amendment is only a trial right.[12] *See Renda v. King*, 347 F.3d 550, 552 (3d Cir. 2003) ("[A] plaintiff may not base a § 1983 claim on the mere fact that the police questioned her in custody without

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[12] The defendants contend that the Sixth Circuit Court of Appeals has also held that the Fifth Amendment is only a trial right. Appellees' Br. at 20–21. But the court did so only in an unpublished opinion. *Smith v. Patterson*, 430 F. App'x 438, 441 (6th Cir. 2011). The court's unpublished opinions do not constitute binding precedent even in the Sixth Circuit. *Graiser v. Visionworks of America, Inc.*, 819 F.3d 277, 283 (6th Cir. 2016).

providing *Miranda* warnings when there is no claim that the plaintiff's answers were used against her at trial."); *Burrell v. Virginia*, 395 F.3d 508, 514 (4th Cir. 2005) ("[The plaintiff] does not allege any *trial* action that violated his Fifth Amendment rights; thus, *ipso facto*, his claim fails on the [*Chavez*] plurality's reasoning."); *Murray v. Earle*, 405 F.3d 278, 285 (5th Cir. 2005) ("The Fifth Amendment privilege against self-incrimination is a fundamental trial right which can be violated only *at* trial, even though pre-trial conduct by law enforcement officials may ultimately impair that right.").

In contrast, the Second, Seventh, and Ninth Circuits have held that certain pretrial uses of compelled statements violate the Fifth Amendment. For example, the Second Circuit has applied *Chavez* to hold that a bail hearing is part of a criminal case under the Fifth Amendment. *Higazy v. Templeton*, 505 F.3d 161, 171, 173 (2d Cir. 2007). The Seventh Circuit has similarly held that a criminal case under the Fifth Amendment includes not only bail hearings but also suppression hearings, arraignments, and probable cause hearings. *Best v. City of Portland*, 554 F.3d 698, 702–03 (7th Cir. 2009) (suppression hearing); *Sornberger v. City of Knoxville*, 434 F.3d 1006, 1027 (7th Cir. 2006) (bail hearings, arraignments, and probable cause hearings). And the Ninth Circuit has concluded that a Fifth Amendment violation occurs when "[a] coerced statement . . . has been relied upon to file formal charges against the declarant, to determine judicially that the prosecution may proceed, and to determine pretrial custody status." *See Stoot v. City of Everett*, 582 F.3d 910, 925 (9th Cir. 2009).

Different approaches have emerged because the *Chavez* Court declined to pinpoint when a "criminal case" begins. *See Koch v. City of Del City*, 660 F.3d

1228, 1245 (10th Cir. 2011) (noting that "the plurality in *Chavez* explicitly declined to decide 'the precise moment when a "criminal case" commences'"). Like the Supreme Court, we have not yet defined the starting point for a "criminal case." *See id.* at 1246 (avoiding this issue by holding that at the time of the plaintiff's arrest, "it was not clearly established that an individual has a Fifth Amendment right to refuse to answer an officer's questions during a *Terry* stop"); *Eidson v. Owens*, 515 F.3d 1139, 1149 (10th Cir. 2008) (declining to define the scope of the right against self-incrimination because the plaintiff "never incriminated herself during a custodial interrogation").

The defendants argue that we have consistently held that the Fifth Amendment right is only a trial right. We disagree.

In support of their argument, the defendants cite our opinions in *Bennett v. Passic*, 545 F.2d 1260 (10th Cir. 1976), and *Pearson v. Weischedel*, 349 F. App'x 343 (10th Cir. 2009) (unpublished). These opinions do not help in answering our question. In *Bennett*, we held that civil liability may not arise from (1) failure to give *Miranda* warnings or (2) testimony about compelled statements. 545 F.2d at 1263–64. These scenarios are not involved here. And in our unpublished opinion in *Pe*arson, we rejected a Fifth Amendment claim, stating that the plaintiff had pleaded guilty and had never gone to trial. *Pearson*, 349 F. App'x at 348. Our analysis was brief and omitted discussion of *Chavez*. Thus, *Pearson* does not aid our inquiry.

In addition, the defendants read *In re Grand Jury Subpoenas Dated Dec. 7 & 8 (Stover)*, 40 F.3d 1096 (10th Cir. 1994), to suggest that a violation of the right against self-incrimination occurs only at trial. This suggestion is based on a questionable interpretation of

the opinion. In *Stover*, the parties agreed that a Fifth Amendment violation occurs when a grand jury returns an indictment based on a compelled statement. 40 F.3d at 1100–01. Notwithstanding the parties' agreement on this issue, we quoted language from an earlier opinion describing the Fifth Amendment as a trial right. *See id.* at 1103 ("The time for protection [of the right against self-incrimination] will come when, if ever, the government attempts to use [allegedly incriminating] information against the defendant at trial." (quoting *United States v. Peister*, 631 F.2d 658, 662 (10th Cir. 1980))).

Though we quoted this restrictive language, we also suggested in dicta that the parties had correctly assumed that the Fifth Amendment is triggered when a compelled statement is used during grand jury proceedings. *See id.* at 1103 ("If an officer, whose compelled statement has been considered by the grand jury, ultimately is indicted, that officer will be able to challenge the indictment and the government will be required to prove that its evidence derives entirely from legitimate sources or that the grand jury's exposure to the officer's statement was harmless."). Thus, *Stover* arguably suggests that the right against self-incrimination is not simply a trial right.

* * *

These precedents supply conflicting signals on whether the term "criminal case" extends beyond the trial itself. The dicta in *Verdugo-Urquidez* suggests that the term "criminal case" refers only to the trial. This dicta would ordinarily guide us, for Supreme Court dicta is almost as influential as a Supreme Court holding. *Indep. Inst. v. Williams*, 812 F.3d 787, 798 n.13 (10th Cir. 2016). But after deciding *Verdugo-Urquidez*, the Supreme Court interpreted the term

"criminal case" in *Mitchell* to include sentencing proceedings. And even later, the Supreme Court declined in *Chavez* to define when a "criminal case" begins.

Like the Supreme Court, we have declined until now to unequivocally state whether the term "criminal case" covers pretrial proceedings as well as the trial. Precedents like *Stover* provide conflicting signals without squarely deciding the issue. Nonetheless, today's case requires us to decide whether the term "criminal case" covers at least one pretrial proceeding: a hearing to determine probable cause.

B. The right against self-incrimination applies to use in a probable cause hearing as well as at trial.

To decide this issue, we join the Second, Seventh, and Ninth Circuits, concluding that the right against self-incrimination is more than a trial right. In reaching this conclusion, we rely on

- the text of the Fifth Amendment, which we interpret in light of the common understanding of the phrase "criminal case," and
- the Framers' understanding of the right against self-incrimination.

The Fifth Amendment provides that no person shall be "compelled in any *criminal case* to be a witness against himself." U.S. Const. amend. V (emphasis added). The text of the Fifth Amendment does not contain

- the term "trial," which appears in the next two amendments, or
- the term "criminal prosecution," which is used in the next amendment.

See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and

public trial . . . ."); *id.* amend. VII ("In suits at common law . . . the right of trial by jury shall be preserved . . . .").

The Supreme Court discussed the distinction between the language of the Fifth and Sixth Amendments in *Counselman v. Hitchcock*, 142 U.S. 547 (1892), *overruled in part on other grounds by Kastigar v. United States*, 406 U.S. 441 (1972). In *Counselman*, the government argued that a witness could not invoke the Fifth Amendment in a grand jury proceeding because a "criminal case" did not exist. 142 U.S. at 562–63. The Supreme Court rejected this argument. After analyzing the Fifth Amendment's text and underlying purpose, the Court held that the witness could plead the Fifth Amendment during a grand jury proceeding. *Id.* In the course of its analysis, the Court reasoned that the language "criminal case" is broader than the Sixth Amendment's phrase "criminal prosecution." *Id.*

We agree with the *Counselman* Court that the term "criminal case" is broader than the term "criminal prosecution." Indeed, on its face, the term "criminal case" appears to encompass all of the proceedings involved in a "criminal prosecution."

"The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning . . . ." *United States v. Sprague*, 282 U.S. 716, 731 (1931). To determine the commonly understood meaning of the phrase "criminal case" at the time of ratification (1791), we examine dictionary definitions from the Founding era. *See* Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 Geo. Wash. L. Rev. 358, 365 (2014); *see also*

William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. Davis L. Rev. 1311, 1338 n.99 (2007) (stating that contemporaneous dictionaries "obviously . . . provide some guidance to the commonly understood meaning of a particular word at the time that word was used in the constitutional text").

The most authoritative dictionary of that era was Noah Webster's 1828 dictionary, *An American Dictionary of the English Language*. *See* John A. Sterling, *Above the Law: Evolution of Executive Orders (Part One)*, 31 UWLA L. Rev. 99, 107 (2000) (stating that most historians use Noah Webster's 1828 dictionary when trying to determine the meaning of words during adoption of the Constitution); *see also* Charles Wood, *Losing Control of America's Future—The Census, Birthright Citizenship, and Illegal Aliens*, 22 Harv. J.L. & Pub. Pol'y 465, 478 (1999) (stating that Noah Webster's 1828 dictionary was "the first and for many years the authoritative American dictionary"); Steven G. Calabresi & Andrea Matthews, *Originalism and* Loving v. Virginia, 2012 B.Y.U. L. Rev. 1393, 1425 (2012) (describing Noah Webster's 1828 dictionary as "an incredible achievement" and as a "dominant" source since its publication); Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 Geo. Wash. L. Rev. 358, 389–90 (2014) (stating that the Supreme Court often cites Noah Webster's 1828 dictionary as evidence of the original meaning of the Constitution, perhaps based on a belief "that the dictionary may reflect better the ways in which Americans used and understood the words in the Constitution"). Webster's 1828 dictionary defines "case" as "[a] cause or suit in court," stating that the term "is nearly synonymous with *cause*." Noah Webster, *Case*, *An*

American Dictionary of the English Language (1st ed. 1828). And the dictionary defines the "nearly synonymous" term "cause" as "[a] suit or action in court." *Id.*, *Cause*. Similarly, N. Bailey's 1789 dictionary broadly defines "case" as a "thing, matter, question." N. Bailey, *The Universal Etymological English Dictionary, Case* (26th ed. 1789).[13]

The Founders' understanding of the term "case" suggests that the Fifth Amendment encompasses more than the trial itself. *See* Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again,"* 74 N.C. L. Rev. 1559, 1627 (1996).[14] "If the Framers had meant to restrict the right to 'trial,' they could have said so."

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[13] The Founders recognized that a word's meaning often changes over time. *See* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519, 534 (2003) ("Americans of the founding generation tended to agree with [Samuel Johnson, the 18th century's leading lexicographer] that language change was inevitable."). But modern legal dictionaries define "case" much as our Founders did. *See Black's Law Dict.* 258 (Bryan A. Garner ed., 10th ed. 2014) (defining "case" as "[a] civil or criminal proceeding, action, suit, or controversy at law or in equity"); *A Handbook of Criminal Law Terms* 84 (Bryan A. Garner ed., 2000) (defining "case" as "[a] proceeding, action, suit, or controversy at law or in equity"); *Dict. of Legal Terms* 70 (Steven H. Gifis, 4th ed. 2008) (defining "case" as "an action, cause, suit, or controversy, at law or in equity"); *see also* Martin H. Redish & Adrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. Chi. L. Rev. 545, 565 (2006) ("[C]urrent-day legal dictionaries define 'case' as a justiciable 'action or suit,' or an 'argument.'" (footnotes omitted)).

[14] Professor Dripps stated:

> A "case" in any event is not necessarily identical to a "prosecution." The Sixth Amendment uses the latter term, in dealing with the criminal trial. The Fifth Amendment, by contrast, con-

Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 Tenn. L. Rev. 987, 1014 (2003).

This interpretation is supported by the Supreme Court's opinion in *Blyew v. United States*, 80 U.S. 581 (1871). In *Blyew*, the Supreme Court addressed the meaning of the word "cases" in Article III's reference, "all cases affecting ambassadors, other public minsters, and consuls." 80 U.S. at 594. The *Blyew* Court explained that "[t]he words 'case' and 'cause' are constantly used as synonyms in statutes and judicial decisions, each meaning a proceeding in court, a suit, or action." *Id.* at 595. Like the dictionary definitions from 1828 to now, Blyew defines "case" broadly, suggesting that a "criminal case" is not limited to the criminal trial.

We are aided not only by Founding-era dictionary definitions and *Blyew* but also by the Framers' understanding of the phrase "in any criminal case." We have few contemporaneous clues of that understanding, for "references to the privilege [against self-incrimination] are scarce in the literature and debates surrounding the ratification of the Constitution and the Bill of Rights." Michael Edmund O'Neill, *The Fifth Amendment in Congress: Revisiting the Privilege Against Compelled Self-Incrimination*, 90 Geo. L.J. 2445, 2486

> tains a miscellany of rights, some against criminal and some against civil liabilities. We speak routinely of police investigators working on a case before they have a suspect. If we think of a "case" as a potential "prosecution" we can square the text of the Fifth Amendment with its history.

Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again,"* 74 N.C. L. Rev. 1559, 1627 (1996) (footnotes omitted).

(2002). But the few existing clues suggest that the Framers viewed the Fifth Amendment as a right in pretrial proceedings as well as at trial.

One clue involves the changes in the Fifth Amendment from drafting to ratification. The amendment had been drafted by James Madison, who omitted the phrase "criminal case":

> No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence; *nor shall be compelled to be a witness against himself*; nor be deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without just compensation.

James Madison, Remarks in Debate in the House of Representatives (June 8, 1789) (emphasis added), *reprinted in* 1 *Debates and Proceedings in the Congress of the United States* 448, 451–52 (Joseph Gales ed., 1834); United States Congress, *Debates and Proceedings in the Congress of the United States* 451–52 (Washington, D.C. 1834). This language "applied to civil as well as criminal proceedings and in principle to any stage of a legal inquiry, from the moment of arrest in a criminal case, to the swearing of a deposition in a civil one." Leonard W. Levy, *Origins of the Fifth Amendment* 423 (1968).

In the floor debate on whether to adopt the Bill of Rights, Representative Laurance expressed concern that Madison's wording would conflict with "laws passed." Statement of Representative John Laurance (Aug. 17, 1789), *reprinted in* 1 *Debates and Proceedings in the Congress of the United States* 782, 782. To

avoid this conflict, Representative Laurance proposed to add the phrase "in any criminal case." *Id.* Representative Laurance's language was accepted in the House and Senate. Leonard W. Levy, *Origins of the Fifth Amendment* 424–26 (1968).

It is unclear which "laws" Representative Laurance was talking about. One possibility was the proposed Judiciary Act, which would allow the judiciary to compel production of documents in civil cases.[15] *See United States v. Hubbell*, 530 U.S. 27, 53–54 n.3 (2000) (Thomas, J., concurring). Another possibility was the Collections Act, which allowed officials to require oaths in customs declarations. Act of July 31, 1789, ch. 5 section 13, 1 Stat. 29, 39–40; see Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 705 n.450 (1999). But whichever law was at risk, Representative Laurance was apparently trying to distinguish between potential criminal liability and civil liability. *See* Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 Tenn. L. Rev. 987, 1017 (2003) ("[R]egardless of which provision Laurance referred to, it is still the case that his concern was not to limit the right to criminal trials as such but only to preserve the distinction that the right applied only to potential criminal liability rather than civil liability.").

When Representative Laurance proposed to confine the Fifth Amendment to a "criminal case," there

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[15] When Representative Laurance proposed to add the phrase "in any criminal case," the Judiciary Act of 1789 had passed in the Senate and remained pending in the House of Representatives. Michael Edmund O'Neill, *The Fifth Amendment in Congress: Revisiting the Privilege Against Compelled Self-Incrimination*, 90 Geo. L.J. 2445, 2484 (2002).

was a consensus that the right against self-incrimination was not limited to a suspect's own trial. To the contrary, "the historical sources show that the right against self-accusation was understood to arise primarily in pretrial or pre-prosecution settings rather than in the context of a person's own criminal trial." *Id.* at 1017–18. If this right were limited to one's own trial, the right would have served little purpose, for criminal defendants were then unable to testify in their own criminal cases. *See Ferguson v. Georgia*, 365 U.S. 570, 574 (1961) (stating that when the United States was formed, "criminal defendants were deemed incompetent as witnesses").

The most natural place for concern about compelled testimony would have been in proceedings outside of criminal trials, such as grand jury proceedings. *See* David Rossman, *Conditional Rules in Criminal Procedure: Alice in Wonderland Meets the Constitution*, 26 Ga. St. U.L. Rev. 417, 488 (2010).

After adopting Representative Laurance's language, the Senate reorganized the cluster of rights that ultimately went into the Fifth and Sixth Amendments. "In what was to be the Sixth Amendment the Senate clustered together the procedural rights of the criminally accused after indictment." Leonard W. Levy, *Origins of the Fifth Amendment* 427 (1968); *see also* Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 Tenn. L. Rev. 987, 1013 (2003) ("[T]he Sixth Amendment plainly deals with rights that protect 'the accused' during the court phase of prosecutions, including trials."). This grouping of Sixth Amendment rights omitted the right against self-incrimination, which was put into the Fifth

Amendment with other rights that unambiguously extended to pretrial proceedings as well as the trial:

> That the self-incrimination clause did not fall into the Sixth Amendment indicated that the Senate, like the House, did not intend to follow the implication of [Section 8 of the 1776 Virginia Declaration of Rights] . . . that the right not to give evidence against oneself applied merely to the defendant on trial. The Sixth Amendment, referring explicitly to the accused, protected him alone. Indeed the Sixth Amendment, with the right of counsel added, was the equivalent of Virginia's Section 8 and included all of its rights except that against self-incrimination. Thus, the location of the self-incrimination clause in the Fifth Amendment rather than the Sixth proves that the Senate, like the House, did not intend to restrict that clause to the criminal defendant only nor only to his trial. The Fifth Amendment, even with the self-incrimination clause restricted to criminal cases, still puts its principles broadly enough to apply to witnesses and to any phase of the proceedings.

Leonard W. Levy, *Origins of the Fifth Amendment* 427 (1968); *see also* Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 Tenn. L. Rev. 987, 1009–13 (2003) ("[T]he right against compelled self-accusation is in the wrong amendment to be a

'trial right.'"); Michael J. Zydney Mannheimer, *Ripeness of Self-Incrimination Clause Disputes*, 95 J. Crim. L. & Criminology 1261, 1322 (2005) ("It appears that the placement of the Self-Incrimination Clause in the Fifth Amendment rather than the Sixth signifies that a 'criminal case' can exist before a 'criminal prosecution[]' commences." (alteration in original)).

In sum, there is nothing to suggest that the Framers were seeking to confine the right against self-incrimination to trial. The Founders apparently viewed the right more broadly, envisioning it to apply beyond the trial itself.

The defendants argue that this interpretation of the Fifth Amendment is impractical because pretrial proceedings are often used to determine whether evidence is admissible at trial. We disagree.

For this argument, the defendants contend that courts have held in other contexts that evidence may be used in pretrial proceedings even if the evidence would be inadmissible at trial.[16] The defendants attempt to import this practice into the Fifth Amendment context. This attempt avoids the question by assuming that the use of compelled statements in pretrial proceedings is not rendered inadmissible by the Fifth Amendment. If the Fifth Amendment applies to pretrial proceedings, the evidence would be considered inadmissible in pretrial proceedings as well as at trial. As a result, the defendants' argument does not help us decide whether the Fifth Amendment precludes use of compelled statements in pretrial proceedings.

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[16] The defendants also observe that the Fifth Amendment does not apply to physical evidence. Appellees' Br. at 25. But the defendants do not tie this observation to their argument for limiting the Fifth Amendment to a trial right.

* * *

Mr. Vogt alleged that his compelled statements had been used in a probable cause hearing. As a result, we conclude that Mr. Vogt has adequately pleaded a Fifth Amendment violation consisting of the use of his statements in a criminal case.[17]

IV. We affirm the dismissal of the claims against the individual police officers and the City of Haysville.

Though we conclude that Mr. Vogt has adequately pleaded the use of his compelled statements in a criminal case, we affirm the dismissal of the (1) claims against the four police officers based on qualified immunity and (2) claims against the City of Haysville based on its lack of compulsion in Mr. Vogt's making of a self-incriminating statement.

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[17] The defendants argue that Mr. Vogt

> is not entitled to rely upon an inference that his alleged admissions were "admitted into evidence through witness testimony." Aplt. Brief, p. 31. No facts have been pled regarding the admission of any self-incriminatory statements into evidence or any witness testimony based thereon, and such facts cannot be reasonably inferred, because they are flatly inconsistent with the fact that the charges against Vogt were dismissed. The only reasonable inference to be drawn from the fact of dismissal is that Vogt's admissions (if any) were not admitted into evidence by the court.

Appellees' Br. at 37. We disagree. Mr. Vogt's complaint states that the "compelled statements and fruits thereof were used against him in a criminal case." Appellant's App. at 16. At this stage, we can reasonably infer that these statements were used to support probable cause.

A. The four police officers are entitled to qualified immunity.

We conclude that the four police officers are protected by qualified immunity.

Qualified immunity would protect the officers from suit in the absence of factual allegations plausibly showing the violation of a clearly established constitutional right. *Schwartz v. Booker*, 702 F.3d 573, 579 (10th Cir. 2012).

We apply this test to the constitutional violation: compulsion of self-incriminating statements that were ultimately used in a probable cause hearing. We have already decided that Mr. Vogt's right against self-incrimination was violated when his compelled statements were used in a probable cause hearing in 2014.[18] For the sake of argument, we will also assume that this right was violated in 2013 and 2014 when Mr. Vogt's compelled statements were allegedly used to develop investigatory leads, initiate a criminal investigation, and bring charges. Thus, we must decide whether Mr. Vogt's Fifth Amendment right was clearly established when these violations took place. In our view, the state of the law was not clearly established when Mr. Vogt's compelled statements were allegedly used.

For a constitutional right to be clearly established, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as [Mr. Vogt] maintains." *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1108 (10th Cir. 2008).

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[18] We need not decide whether uses before the probable cause hearing would have constituted additional violations of the Fifth Amendment.

Until today, the applicability of the Fifth Amendment to pretrial proceedings remained unsettled, for the Supreme Court had declined to decide "the precise moment when a 'criminal case' commences"[19] and we had declined to decide whether the Fifth Amendment applied to pretrial proceedings.[20] And outside our circuit, courts had disagreed about the applicability of the Fifth Amendment to pretrial proceedings. *See Mocek v. Albuquerque*, 813 F.3d 912, 929 n.9 (10th Cir. 2015) ("A circuit split will not satisfy the clearly established prong of qualified immunity."). Thus, when the police officers acted, they could not have known that the Fifth Amendment would be violated by the eventual use of the compelled statement to develop investigatory leads, initiate a criminal investigation, bring charges, or support the prosecution in a probable cause hearing. As a result, the alleged constitutional violation was not clearly established.

In similar circumstances, the Ninth Circuit Court of Appeals took a different approach. That court interpreted the Fifth Amendment to apply in a pretrial hearing to determine whether to release or detain the defendant. *Stoot v. City of Everett*, 582 F.3d 910, 925 (9th Cir. 2009). This interpretation required the court to determine whether a police detective enjoyed qualified immunity after compelling a statement that was

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[19] *Chavez v. Martinez*, 538 U.S. 760, 766–67 (2003) (plurality opinion).

[20] *See Koch v. City of Del City*, 660 F.3d 1228, 1245 (10th Cir. 2011) (avoiding this issue by concluding that when the plaintiff was arrested, "it was not clearly established that an individual has a Fifth Amendment right to refuse to answer an officer's questions during a *Terry* stop"); *Eidson v. Owens*, 515 F.3d 1139, 1149 (10th Cir. 2008) (refraining from defining the scope of the right against self-incrimination because the plaintiff "never incriminated herself during a custodial interrogation").

later used in a hearing to determine release or detention. *See id.* at 927–28. To decide qualified immunity, the court considered the underlying purpose of qualified immunity, which was to prevent deterrence of reasonable officers trying to carry out their duties. *Id.* at 927. This purpose led the court to "focus on [the] officer's duties, not on other aspects of the constitutional violation." *Id.*

Focusing on the officer's duties, the court declined to permit qualified immunity because the police detective had been on notice that coercion of a confession could ripen into a Fifth Amendment violation. *Id.* And once the police detective coerced a confession and turned it over to the prosecutor, the detective's role in the constitutional violation was complete. *Id.* at 927–28. Thus, the Ninth Circuit did not tarry over whether the detective would have known which uses would violate the Fifth Amendment; he knew all along that coercing a confession could lead to a Fifth Amendment violation. *Id.* As a result, the Ninth Circuit determined that the detective was not entitled to qualified immunity. *Id.*

We respectfully disagree with this approach. The Ninth Circuit appeared to acknowledge that its test would allow police officers to incur personal liability for contributing to a constitutional violation that had not been clearly established. *See id.* at 913 ("[T]he aspects of the pertinent law not clearly established at the time of the confession did not affect [the detective]'s role in bringing about the violation."). But qualified immunity protects officers from liability when the misconduct did not violate a clearly established right. *See* pp. 26–27, above.

The four police officers allegedly compelled a statement used before trial but not in an actual trial. Until

now, the precedents had not clearly determined whether these uses would have violated the Fifth Amendment. Thus, even if the police officers could have anticipated the eventual use in a probable cause hearing, they could not have known that this use would violate the Fifth Amendment. Thus, we reject the approach taken in the Ninth Circuit.

* * *

Because it was not clearly established in 2013 or 2014 that the pretrial use of Mr. Vogt's statements would violate the Fifth Amendment, the four police officers are entitled to qualified immunity.

B. Mr. Vogt did not adequately allege that Haysville had compelled the making of a self-incriminating statement.

As noted, Haysville conditioned its job offer to Mr. Vogt: he would get the job only if he told the Hays police department that he had taken the knife. According to Mr. Vogt, this condition compelled him to make self-incriminating statements to the City of Hays; Haysville responds that the condition on the job offer was not coercive. We agree with Haysville, concluding that the condition on the job offer did not compel Mr. Vogt to make a self-incriminating statement. Thus, we affirm the dismissal of the claim against Haysville.

The issue stems from the Supreme Court's opinion in *Garrity v. New Jersey*, 385 U.S. 493 (1967). There the Court held that public employers cannot require their employees to waive the right against self-incrimination as a condition of continued employment. 385 U.S. at 497–98, 500. In that case, police officers under investigation faced discharge if they refused to answer incriminating questions without immunity from criminal prosecution. *Id.* at 494, 497. In the Court's view,

the officers faced a Hobson's choice amounting to compulsion: they had to decide between avoiding self-incrimination and losing their jobs. *Id.* at 497–98, 500. Because the incriminating answers had been compelled, they could not be used against the officers in a subsequent criminal proceeding. *Id.*

Garrity has been applied outside of the conventional employment relationship. *See, e.g., Lefkowitz v. Turley*, 414 U.S. 70, 82–83 (1973) (extending *Garrity* to public contractors); *Spevack v. Klein*, 385 U.S. 511, 514, 516 (1967) (applying the Fifth Amendment to potential disbarment). Thus, the Fifth Amendment may be triggered even by the threatened loss of an unsalaried position. For example, in *Lefkowitz v. Cunningham*, the Supreme Court invalidated a state law requiring officers of political parties to either waive their right against self-incrimination or suffer automatic termination from office and a five-year disqualification from public office. 431 U.S. 801, 802–04 (1977). Though the political officers were unpaid, the Court held that the law had presented "grave consequences" because "party offices carry substantial prestige and political influence." *Id.* at 807. The Court also noted the law's potential economic consequences, for the claimant would suffer from the loss of professional standing and the possibility of holding future public offices. *Id.* In addition, the Court pointed out that the law was coercive because it impinged on an individual's right to participate in private, voluntary political associations—a key facet of the freedom guaranteed by the First Amendment. *Id.* at 807–08.

In each of these cases, individuals were threatened with the loss of some benefit or the infringement of an important right that they already enjoyed. These individuals already had a job, government contract, or right that was being threatened upon exercise of the

right against self-incrimination. Our circumstances are different. Mr. Vogt was never an employee of Haysville, and his conditional job offer did not threaten the loss of livelihood or an existing job.

If Mr. Vogt had not wanted to incriminate himself, he could have declined the job offer and continued working for Hays. With that alternative freely available, Mr. Vogt was under no compulsion to comply with Haysville's condition to its job offer.

Mr. Vogt argues that Haysville threatened his ongoing employment relationship with Hays by promising to verify his future disclosure to Hays. According to Mr. Vogt, this threat created an additional measure of compulsion. But the complaint does not suggest that Haysville would contact the City of Hays even if Mr. Vogt had declined the employment offer. In fact, the complaint alleges that the City of Haysville promised to "follow-up with Hays to ensure that [Mr. Vogt] had complied with this *condition of employment*." Appellant's App. at 14 (emphasis added).

Because the complaint characterizes the disclosure requirement as a condition of the job offer, the only reasonable inference is that Haysville would not verify anything if Mr. Vogt were to decline the job offer. Thus, Haysville's promise to follow up with Hays did not compel Mr. Vogt to make a self-incriminating statement.

* * *

We conclude that the conditional job offer was not coercive. On this basis, we affirm the dismissal of the claim against Haysville.

V. Mr. Vogt has stated a valid claim against the City of Hays.

Hays urges three additional grounds for dismissal: (1) Mr. Vogt has not adequately pleaded causation; (2) Hays cannot incur liability because no one with final policymaking authority violated the Constitution; and (3) violation of the Fifth Amendment cannot serve as the basis for a § 1983 claim.[21] We reject these arguments.

A. Mr. Vogt has adequately pleaded causation.

Hays argues that it did not cause a violation of the Fifth Amendment. Rather, Hays submits that it merely gave Mr. Vogt's compelled statements to the Kansas Bureau of Investigation, pointing out that Hays did not make the decision to pursue criminal charges or to use the statements in pretrial proceedings.

Section 1983 imposes liability on a state actor who "causes to be subjected . . . any citizen . . . to the deprivation of any rights." 42 U.S.C. § 1983. This language must be read against the backdrop of tort law, which makes individuals responsible for the natural consequence of their actions. *Martinez v. Carson*, 697 F.3d 1252, 1255 (10th Cir. 2012). Thus, causation exists if Hays initiated actions that it knew or reasonably should have known would cause others to deprive Mr. Vogt of his right against self-incrimination. *Id.* Accordingly, Hays could incur liability even if it had been

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[21] Hays also argues that (1) witnesses in criminal proceedings enjoy absolute immunity from civil liability arising out of their testimony and (2) individuals testifying at trial do not act under color of law. But Mr. Vogt does not allege that the defendants acted unlawfully by testifying during the probable cause hearing. Rather, Mr. Vogt alleges that Hays unconstitutionally compelled him to incriminate himself. Though the use of those statements in the probable cause hearing would complete the alleged Fifth Amendment violation, the act of testifying does not serve as the basis of Mr. Vogt's claims.

someone else who used the compelled statements in a criminal case.

Mr. Vogt alleges in the complaint that Hays compelled self-incriminating statements, then initiated a criminal investigation that ended with use of the incriminating statements in a probable cause hearing. The complaint states that

- Mr. Vogt reported information to Hays concerning the knife,
- the Hays police chief conditioned Mr. Vogt's continued employment as a Hays police officer on his documenting the facts related to possession of the knife,
- Mr. Vogt wrote a vague one-sentence report, and
- a Hays police officer elicited further details about Mr. Vogt's possession of the knife.

The complaint adds that the Hays police chief then requested a criminal investigation of Mr. Vogt and furnished incriminating statements to investigators, which led to use of the incriminating statements in a probable cause hearing.

Taking these allegations as true, we conclude that Mr. Vogt adequately pleaded that Hays had started a chain of events that resulted in violation of the Fifth Amendment. *See Stoot v. Everett*, 582 F.3d 910, 926–27 (9th Cir. 2009) (concluding that a police officer, who allegedly coerced statements, may incur liability under § 1983 for violation of the Fifth Amendment when a prosecutor used those statements in a criminal case); *McKinley v. Mansfield*, 404 F.3d 418, 436–39 (6th Cir. 2005) (holding that police officers can incur § 1983 liability for allegedly coercing a suspect to make self-incriminating statements even though it was another person, the prosecutor, who used the statements in a

criminal case).

B. Mr. Vogt adequately pleaded that the Fifth Amendment violation had been committed by someone with final policymaking authority for the City of Hays.

Hays argues that it cannot incur liability for actions by the Hays police chief because he was not a final policymaker for the city. We disagree.

Cities cannot incur liability under § 1983 on a respondeat superior theory, but can be liable if a final policymaker takes unconstitutional action. *See Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978); *Dill v. City of Edmond*, 155 F.3d 1193, 1211 (10th Cir. 1998). "Whether an individual is a final policymaker for purposes of § 1983 liability 'is a legal issue to be determined by the court based on state and local law.'" *Dill*, 155 F.3d at 1210 (quoting *Randle v. City of Aurora*, 69 F.3d 441, 447 (10th Cir. 1995)). Mr. Vogt pleaded facts indicating that the Hays police chief was a final policymaker on the requirements for police employees.

This inquiry turns on whether the Hays police chief had authority to establish official policy on discipline of employees within the police department. *See id.* at 1211 (stating that whether the municipal police chief at the time of the alleged violation was "a final policymaker turns on whether he had the authority to establish official city policy on employee transfers and discipline within the police department"). To make this determination, we consider whether the police chief's decisions were constrained by general policies enacted by others, whether the decisions were reviewable by others, and whether the decisions were within the police chief's authority. *Randle*, 69 F.3d at 448.

The complaint alleges that the Hays police chief had final policymaking authority for the police department. There is nothing in the complaint to suggest that his decisions were subject to further review up the chain-of-command.

Hays argues that final policymaking authority rested with the City Manager and City Commission rather than the Police Chief. For this argument, Hays points to municipal ordinances stating that the city commission must hire a city manager, who appoints the police chief and administers city business. But the city ordinances do not specify who bears ultimate responsibility for discipline of police officers like Mr. Vogt.

We addressed a similar situation in *Dill v. City of Edmond*, 155 F.3d 1193 (10th Cir. 1998). That case involved a due process violation from a change in a police officer's position from detective to patrol officer. 155 F.3d at 1210. There the municipal charter designated the city manager as the municipality's administrative head, who had authority to appoint and remove the police chief and to hire and fire employees. *Id.* at 1211. Notwithstanding the city manager's powers, we concluded that the police chief was a final policymaker for disciplinary transfers of police officers. We had four reasons for this conclusion:

1. The city ordinances had not directly stated who was authorized to determine the policy on transfers and discipline.
2. Trial testimony had indicated that the transfer was based on a policy adopted by the police chief.
3. The city manager had testified that he did not involve himself with transfers.
4. The decision to transfer the plaintiff had fallen

within the authority of the police chief.

Id.

We took a similar approach in *Flanagan v. Munger*, 890 F.2d 1557 (10th Cir. 1989). There too the issue was whether the municipal police chief had final policymaking authority for disciplinary decisions within the police department. 890 F.2d at 1568. In that case, the municipality admitted that the police chief had final authority to issue reprimands for its officers—an admission that we described as effectively disposing of the municipal liability issue. *Id.* Notwithstanding this admission, we analyzed the municipality's argument that the police chief lacked final policymaking authority under the municipal code. The municipality pointed out that

- the city manager had to manage and supervise all matters related to the police department, its officers, and employees,
- the city manager could set aside any action taken by the police chief and "supersede any department head in the functions of his position," and
- "[t]he rules of the Civil Service Commission ... govern[ed] disciplinary matters relative to uniformed personnel [e.g., review by City Council] except as otherwise provided by charter or ordinance."

Id. (quoting the city's municipal code) (alterations in original).

We acknowledged that the police chief's decisions were subject to review by the city manager and city council. *Id.* Nonetheless, we held that the police chief had final policymaking authority for disciplinary decisions within the police department. *Id.* at 1568–69.

We had two reasons. First, the municipal code empowered the police chief to directly manage and supervise the force and made him "responsible for the discipline, good order and proper conduct of the Department, [and] the enforcement of all laws, ordinances and regulations pertaining thereto." *Id.* (quoting the city's municipal code) (alteration in original). Second, the municipal code did not create a mandatory or formal review of the police chief's action. *Id.* at 1569. Thus, we concluded that "for all intents and purposes the [police chief's] discipline decisions [were] final" and that "any meaningful administrative review [was] illusory." *Id.* at 1569. This conclusion led us to hold that the police chief had final policymaking authority even under the municipal code. *Id.*

Under *Dill* and *Flanagan*, we conclude that Mr. Vogt has adequately pleaded final policymaking authority on the part of the Hays police chief. As in *Dill* and *Flanagan*, the city has pointed to general supervisory responsibilities of the city manager. But there is nothing in the municipal ordinances suggesting that the city manager plays a meaningful role in disciplinary decisions within the police department. The absence of such provisions is fatal at this stage, where we must view all of the allegations and draw all reasonable inferences in favor of Mr. Vogt. *See Dias v. City and Cty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009). As a result, we conclude that Mr. Vogt has adequately pleaded final policymaking authority on the part of the Hays police chief.

C. Violation of the Fifth Amendment can serve as the basis for liability under § 1983.

In a single sentence, Hays contends that "*Chavez* held there is no claim for civil liability under the Fifth

Amendment and that claims related to securing compelled/coerced statements required egregious government action under a substantive due process analysis." Appellees' Br. at 20. Hays does not explain or support this sentence, and it is incorrect. *Chavez* did not make such a holding. Thus, Hays's single sentence does not support the dismissal.

VI. Disposition

We affirm the dismissal of the claims against the City of Haysville and the four police officers. We reverse the dismissal of the claim against the City of Hays and remand for further proceedings consistent with this opinion.

HARTZ, Circuit Judge, concurring:

I join Judge Bacharach's opinion for the panel. I write separately to emphasize the limits of what we are saying. We have addressed only issues raised by the parties. Some of the questions we have not answered are: (1) Even though the Fifth Amendment privilege against self-incrimination can be violated by use of the defendant's statements at a probable-cause hearing, can there be a violation when such use does not cause a criminal sanction to be imposed on the defendant (such as when, as here, the court does not find probable cause)? (2) When a person voluntarily discloses information to a government agency, does he or she thereby waive any Fifth Amendment objection to disclosing that same information to another government agency? (3) Under what circumstances can an employee who has given notice of resignation claim that a request for incriminatory information was coercive? And, most significantly, (4) In light of post-*Garrity* developments in Fifth Amendment doctrine, if a public employee believes that he or she is being coerced by

the employer into making self-incriminatory statements, must the employee invoke the privilege against self-incrimination by refusing to provide information, or can the employee still, as in *Garrity*, provide the information and then demand immunity from use of the information? *See* Peter Westen, *Answer Self-Incriminating Questions or Be Fired*, 37 Am. J. Crim. L. 97 (2010).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil No. 15–1150–MLB.

MATTHEW VOGT, PLAINTIFF

v.

CITY OF HAYS, KANSAS, ET. AL., DEFENDANT

Signed: Sep. 30, 2015.
Filed: Sep. 30, 2015.

MEMORANDUM AND ORDER

MONTI L. BELOT, District Judge.

This case comes before the court on defendants' motions to dismiss. (Docs. 11, 13, 15). The motions have been fully briefed and are ripe for decision. (Docs. 12, 14, 16, 26, 27, 28). Defendants' motions are granted for the reasons herein.

I. Facts

Plaintiff Matthew Vogt was employed by defendant City of Hays as a police officer. In late 2013, Vogt sought employment with defendant City of Haysville. During the hiring process, Vogt disclosed to Haysville that he had kept a knife that he obtained while working as a Hays police officer. Defendant Kevin Sexton, a police officer for Haysville, was directed by defendant Jeff Whitfield, Chief of Police for Haysville, to extend an offer of employment to Vogt. The offer of employment was conditioned on Vogt reporting his possession of the knife to the Hays police department.

On December 11, 2013, Vogt reported his possession of the knife to defendant Don Scheibler, Chief of Police for Hays. Scheibler told Vogt to document the facts related to the possession of the knife. Vogt complied and wrote a vague one-sentence report. Vogt then submitted his two weeks' notice of resignation to the Hays police department. Defendant Brandon Wright, a police officer for Hays, opened an internal investigation. Wright informed Vogt that he was only seeking policy violations and was not conducting a criminal investigation. Vogt gave Wright a statement concerning his possession of the knife. Scheibler suspended the internal investigation on December 22 and requested the Kansas Bureau of Investigation (KBI) initiate a criminal investigation. Wright turned all of the evidence over to the KBI.

Due to the criminal investigation, Hays withdrew its offer of employment. In early 2014, Vogt was charged with two felony counts related to his possession of the knife. At the probable cause hearing, Vogt's statements were used as evidence. The charges were dismissed after the court determined that there was no probable cause to support the charges.

Vogt brought this action pursuant to 42 U.S.C. § 1983 against defendants alleging that they violated Vogt's right to be free from self-incrimination. Defendants move to dismiss the complaint on the basis that it fails to state a claim.

II. Motion to Dismiss Standards: FRCP 12(b)(6)

The standards this court must utilize upon a motion to dismiss are well known. To withstand a motion to dismiss for failure to state a claim, a complaint must contain enough allegations of fact to state a claim to relief that is plausible on its face. *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (citing *Bell*

Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1974 (2007)). All well-pleaded facts and the reasonable inferences derived from those facts are viewed in the light most favorable to plaintiff. *Archuleta v. Wagner*, 523 F.3d 1278, 1283 (10th Cir. 2008). Conclusory allegations, however, have no bearing upon this court's consideration. *Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1200 (10th Cir. 2007). In the end, the issue is not whether plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claims. *Beedle v. Wilson*, 422 F.3d 1059, 1063 (10th Cir. 2005).

III. Analysis

When law enforcement officers abuse their power, suits against them allow those wronged an effective method of redress. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (citing *Harlowe v. Fitzgerald*, 457 U.S. 800, 814 (1982)). Pursuant to 42 U.S.C. section 1983, any person who "under color of . . . [law] . . . subjects, or causes to be subjected, . . . any [person] . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." Section 1983 was enacted to provide protections to those persons wronged by the misuse of power. While the statute itself creates no substantive civil rights, it does provide an avenue through which civil rights can be redeemed. *See Wilson v. Meeks*, 52 F.3d 1547, 1552 (10th Cir. 1995). To state a claim for relief in a section 1983 action, plaintiff must establish that he was (1) deprived of a right secured by the Constitution or laws of the United States and (2) that the alleged deprivation was committed under color of state law. *See Am. Mfr's. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999).[1]

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[1] Defendants do not deny that they were acting under color of state law.

Vogt claims that defendants violated his Fifth Amendment right to be free from self-incrimination. Like other individuals, government employees enjoy the protection of the privilege against self-incrimination. The government, however, must ensure that its employees are lawfully performing their duties. The government therefore may "penalize public employees and government contractors (with the loss of their jobs or government contracts) to induce them to respond to inquiries, so long as the answers elicited (and their fruits) are immunized from use in any criminal case against the speaker." *Chavez v. Martinez*, 538 U.S. 760, 768, 123 S. Ct. 1994 (2003). What the government cannot do is both demand a potentially self-incriminating statement and reserve the right to use that statement in a later criminal proceeding. *Id.* at 768–69. Public employees cannot be given the "Hobson's choice between self-incrimination and forfeiting [their] means of livelihood." *Gardner v. Broderick*, 392 U.S. 273, 277, 88 S. Ct. 1913 (1968); *Gulden v. McCorkle*, 680 F.2d 1070, 1074 (5th Cir. 1982) (observing that "it is the compelled answer in combination with the compelled waiver of immunity that creates the Hobson's choice for the employee"). "If the State presents a person with the Hobson's choice of incriminating himself or suffering a penalty, and he nevertheless refuses to respond, the State cannot constitutionally make good on its threat to penalize him." *Grand Jury Subpoenas Dated Dec. 7 & 8, Issued to Bob Stover, Chief of Albuquerque Police Dep't v. United States*, 40 F.3d 1096, 1101 (10th Cir. 1994).

A. 5th Amendment Violation

All defendants contend that Vogt's claims fail because he cannot establish a Fifth Amendment violation. The Tenth Circuit has identified two ways a public employee's Fifth Amendment rights can be violated

in a case where an employee was compelled to give a statement. "First, a statement may not be obtained in violation of the Constitution. Thus, the State may not insist that public employees waive their Fifth Amendment privilege against self-incrimination and consent to the use of the fruits of the interrogation in any later proceedings brought against them." *Id.* "The second restriction placed on the government in this context is a complete prohibition on the use in subsequent criminal proceedings of statements obtained under threat of removal from office." *Id.* at 1102.

The facts alleged in the complaint show that Vogt is claiming defendants have violated his Fifth Amendment rights by using his compelled statement in the criminal case. There are no allegations that defendants forced Vogt to consent to the use of his compelled statements in the criminal case, i.e. requiring Vogt to waive his Fifth Amendment rights. Therefore, this case turns on whether the compelled statements were used in a criminal proceeding.[2]

Defendants contend that Vogt's statements were not used in a criminal case in violation of the Fifth Amendment because Vogt's case was dismissed prior to trial. Vogt, however, cites to language in the most recent Supreme Court case on this issue, *Chavez v. Martinez*, 538 U.S. 760, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003), and cases from the Ninth, Seventh and Second Circuits in support of his position that a Fifth Amendment violation occurs when criminal proceedings have commenced and the compelled statements

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[2] The Haysville defendants additionally contend that they should be dismissed because a conditional offer of employment is not sufficient to trigger a Fifth Amendment violation under *Garrity* and its progeny. Because the court finds that no constitutional violation has occurred, *infra*, it is unnecessary to resolve this issue.

are introduced in those preliminary proceedings. *Stoot v. City of Everett*, 582 F.3d 910, 925 (9th Cir. 2009); *Best v. City of Portland*, 554 F.3d 698 (7th Cir. 2009); *Higazy v. Templeton*, 505 F.3d 161, 170–73 (2nd Cir. 2007).

In *Chavez*, the Supreme Court addressed whether the right to be free from self-incrimination is violated when no criminal case is brought against the compelled individual. The plaintiff in *Chavez* was arrested after an incident, taken to the hospital, where the defendant police officer interrogated him while the plaintiff was receiving medical treatment. The plaintiff brought a section 1983 claim against the officer, alleging that the interrogation violated his Fifth Amendment right against self-incrimination. *Chavez*, 538 U.S. at 764–65. A four-member plurality of the Supreme Court held that a violation of the Fifth Amendment "occurs only if one has been compelled to be a witness against himself in a criminal case." *Id.* at 770. The Court accordingly held that the officer was entitled to qualified immunity because the plaintiff was never prosecuted for a crime. "However, the plurality in Chavez explicitly declined to decide 'the precise moment when a criminal case commences' for the purposes of the Fifth Amendment right against self-incrimination." *Koch v. City of Del City*, 660 F.3d 1228, 1245 (10th Cir. 2011) (quoting *Chavez*, 538 U.S. at 766–67).

After *Chavez*, the Tenth Circuit has not answered the question left open by the Supreme Court. In *Eidson v. Owens*, 515 F.3d 1139 (10th Cir. 2008), the Tenth Circuit was presented with the question of whether the plaintiff's Fifth Amendment rights were violated when her allegedly compelled statement was introduced during the preliminary proceedings of a criminal case. The Tenth Circuit stated that the "right

against compelled self-incrimination arguably has no application here because it is a trial right, *see Chavez v. Martinez*, 538 U.S. 760, 767, 123 S. Ct. 1994, 155 L. Ed.2d 984 (2003), and her criminal case never went to trial." *Id.* at 1149. The Circuit noted that the Supreme Court in *Chavez* "declined to decide whether use of compelled statements at some point before trial but after the initiation of criminal proceedings was actionable." *Id.* Ultimately, however, the Circuit determined that the plaintiff did not incriminate herself during a custodial interrogation and therefore, there was no Fifth Amendment violation. The Circuit declined to express its "agreement or disagreement with the Seventh Circuit." *Id.*

In *Sornberger v. City of Knoxville, Illinois*, 434 F.3d 1006 (7th Cir. 2006), the Seventh Circuit addressed the question of whether the plaintiffs had stated a violation of the Fifth Amendment after their compelled statements were used to support the criminal charges and introduced in a suppression hearing. The criminal charges against the plaintiffs were ultimately dropped. The Seventh Circuit determined that the statements were used in a criminal case in violation of the Fifth Amendment and, therefore, the plaintiffs could proceed on their claim. Both the Ninth and Second Circuit agree with the Seventh Circuit. *Stoot*, 582 F.3d 910; *Higazy*, 505 F.3d 161. The Circuits, however, are split on this issue.

In *Renda v. King*, 347 F.3d 550 (3d Cir. 2003), the Third Circuit held that a Fifth Amendment violation does not occur until the compelled statements are used at trial. In *Renda*, the plaintiff was charged with a crime and her statements were used in obtaining the indictment and during a suppression hearing. The Third Circuit noted that the Supreme Court did not answer the question of whether an individual's Fifth

Amendment right is violated when a compelled statement is used to initiate criminal proceedings but prior to trial. In light of the fact that this question was left open, the Third Circuit relied on past precedent which conclusively held that the Fifth Amendment right is not violated until a compelled statement is introduced at trial. *Id.* at 558–59.

The Fourth, Fifth and Sixth Circuits also hold that the Fifth Amendment right is not violated until a compelled statement is introduced at trial. *See Burrell v. Virginia*, 395 F.3d 508, 513–14 (4th Cir. 2005) ("He does not allege any trial action that violated his Fifth Amendment rights; thus, ipso facto, his claim fails on the plurality's reasoning [in *Chavez*] . . ."); *Murray v. Earle*, 405 F.3d 278, 285 (5th Cir. 2005)("The Fifth Amendment privilege against self-incrimination is a fundamental trial right which can be violated only at trial, even though pre-trial conduct by law enforcement officials may ultimately impair that right."); *Smith v. Patterson*, Nos. 10–1228, 10–1299, 10–1576, 2011 WL 2745807, *3 (6th Cir. July 14, 2011) ("But when the government does not try to admit the confession at a criminal trial, the Fifth Amendment plays no role.")

In light of the Tenth Circuit's silence on the question, the court holds that it is bound by Tenth Circuit precedent. The Tenth Circuit has consistently held that the Fifth Amendment right to be free from self-incrimination is a trial right. In *Pearson v. Weischedel*, No. 09–8058, 2009 WL 3336117 (10th Cir. Oct. 19, 2009), the plaintiff was allegedly forced by officers to reveal the location of evidence. The plaintiff was then charged in a criminal case based on the evidence which was obtained as a result of the allegedly coerced statement. The plaintiff plead guilty to the charges. The

Tenth Circuit held that "[a]lthough conduct by law enforcement officials prior to trial may ultimately impair the privilege against self-incrimination, a constitutional violation occurs only at trial." *Id.* (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264, 110 S. Ct. 1056 (1990)).

In *Stover*, 40 F.3d at 1101–03, the Tenth Circuit held that the protections of the Fifth Amendment are not realized until the government attempts to make use of compelled statements at trial. In *Stover*, officers were compelled to make statements to a grand jury. The Tenth Circuit recognized that their statements could potentially result in the initiation of a criminal case, however, the Circuit stated that the "time for protection will come when, if ever, the government attempts to use the information against the defendant at trial. We are not willing to assume that the government will make such use, or if it does, that a court will allow it to do so." *Id.* at 1103. In *Eidson*, 515 F.3d at 1149, the Circuit also reiterated that the Fifth Amendment is not implicated until trial.

In this case, the compelled statements were allegedly used in obtaining the criminal charges and in the probable cause hearing. The criminal charges, however, were dismissed by the district judge. Therefore, the compelled statements were never introduced against Vogt at trial. While *Chavez* may indicate that the Supreme Court *could* recognize a Fifth Amendment violation if a compelled statement is introduced during criminal proceedings before trial, the Supreme Court has yet to affirmatively state so. Therefore, this court is bound by Tenth Circuit and Supreme Court authority which conclusively hold that a "constitutional violation occurs only at trial." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264, 110 S. Ct. 1056 (1990).

Accordingly, the court finds that Vogt's complaint fails to state a violation of his Fifth Amendment rights.

IV. Conclusion

Defendants' motions to dismiss are granted. (Docs. 11, 13, 15).

A motion for reconsideration of this order is not encouraged. Any such motion shall not exceed 3 double-spaced pages and shall strictly comply with the standards enunciated by this court in *Comeau v. Rupp*, 810 F. Supp. 1172, 1174 (1992). The response to any motion for reconsideration shall not exceed 3 double-spaced pages. No reply shall be filed.

IT IS SO ORDERED.

Dated this 30th day of September 2015, at Wichita, Kansas.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 15-3266

MATTHEW JACK DWIGHT VOGT,
PLAINTIFF – APPELLANT

v.

CITY OF HAYS, KANSAS; CITY OF HAYSVILLE, KANSAS; DON SCHEIBLER; JEFF WHITFIELD; KEVIN SEXTON; BRANDON WRIGHT, DEFENDANTS – APPELLEES

Filed: January 30, 2017

Order

Before HARTZ, BACHARACH, and McHUGH, Circuit Judges.

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MATTHEW JACK DWIGHT VOGT,

Plaintiff

v.

CITY OF HAYS, KANSAS,

CITY OF HAYSVILLE, KANSAS,

DON SCHEIBLER,

JEFF WHITFIELD,

KEVIN SEXTON,

BRANDON WRIGHT,

Defendant

No. 15-1939

COMPLAINT

JURY TRIAL DEMANDED

COMPLAINT

COMES NOW Plaintiff Matthew Vogt, by and through counsel, and for his causes of action against Defendants, states and alleges as follows:

INTRODUCTION

1. Plaintiff Matthew Jack Dwight Vogt sues through 42 U.S.C. § 1983 for violations of his Fifth Amendment right to be free from self-incrimination as guaranteed by the United States Constitution.

PARTIES

2. Plaintiff is an individual who was employed by the City of Hays, Kansas as a police officer until early 2014. Plaintiff currently resides in Derby, Kansas.

3. Defendant City of Hays, Kansas ("Hays") is a municipal corporation located within Ellis County, Kansas, and duly organized under the laws of the State of Kansas. The Hays Police Department provides police services for Hays.

4. Defendant City of Haysville, Kansas ("Haysville") is a municipal corporation located within Sedgwick County, Kansas, and duly organized under the laws of the State of Kansas. The Haysville Police Department provides police services for Haysville.

5. Defendant Don Scheibler ("Chief Scheibler") was, at all times relevant hereto, chief of the City of Hays Police Department. Chief Scheibler possesses final policy-making authority for the Hays police department. Chief Scheibler is sued in his official and individual capacity and, at all times relevant hereto, acted under color of state law.

6. Defendant Jeff Whitfield ("Chief Whitfield") was, at all times relevant hereto, chief of the City of Haysville Police Department. Chief Whitfield possesses final policy-making authority for the Haysville police department. Chief Whitfield is sued in his official and individual capacity and, at all times relevant hereto, acted under color of state law.

7. Defendant Kevin Sexton ("Lt. Sexton") was, at all times relevant hereto, a lieutenant for the City of Haysville Police Department. Lt. Sexton is sued in his official and individual capacity and, at all times rele-

vant hereto, acted under color of state law and pursuant to the directives of Chief Whitfield and the policies of the Haysville police department.

8. Defendant Brandon Wright ("Lt. Wright") was, at all times relevant hereto, a lieutenant for the City of Hays Police Department. Lt. Wright is sued in his official and individual capacity and, at all times relevant hereto, acted under color of state law and pursuant to the directives of Chief Scheibler and the policies of the Hays police department.

JURISDICTION AND VENUE

9. This Court has jurisdiction over Plaintiff's claims for violations of Plaintiff's rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution under 42 U.S.C. § 1983, 28 U.S.C. § 1331, and 28 U.S.C. § 1343.

10. Venue is proper in this Court because all of the acts and omissions giving rise to Plaintiff's causes of action occurred in this district, all individual defendants are believed to be residents of the State of Kansas, and Hays and Haysville are situated within the State of Kansas.

FACTUAL ALLEGATIONS

11. While still employed as a Hays police officer, Plaintiff sought employment with the Haysville police department in late 2013.

12. During his Haysville hiring process, Plaintiff disclosed that he had kept a knife for his personal use after coming into possession of it while working as a Hays police officer.

13. Lt. Sexton, at the direction of Chief Whitfield, extended Plaintiff a conditional offer of employment with

the Haysville police department which was conditioned upon Plaintiff reporting the above information, and tendering the knife, to the Hays police department.

14. Lt. Sexton and Chief Whitfield warned Plaintiff that they would follow-up with Hays to ensure that Plaintiff had complied with this condition of employment.

15. On or about December 11, 2013, Plaintiff complied with the condition of employment imposed by the Haysville police department in order to obtain employment with Haysville.

16. Chief Scheibler immediately compelled Plaintiff to document the facts related to his possession of the knife as a condition of his employment with the Hays police department and opened an internal investigation seeking only administrative policy violations.

17. In compliance with Chief Scheibler's order, Plaintiff wrote a vague one-sentence report related to his possession of the knife.

18. Having satisfied Haysville's conditions, Plaintiff submitted two weeks' notice of his resignation to the Hays police department so that he could accept employment with the Haysville police department.

19. Lt. Wright, who is responsible for internal investigations conducted by the Hays police department, compelled Plaintiff to give a statement while he was still employed by Hays as a condition of employment, during which Lt. Wright assured Plaintiff that he was seeking only policy violations and was not conducting a criminal investigation.

20. During the internal statement, Lt. Wright elicited further information about Plaintiff's possession of the

knife, including the type of police call Plaintiff was handling when he came into possession of the knife.

21. Lt. Wright used the additional detail elicited in Plaintiff's compelled internal statement as an investigatory lead to locate, among hundreds if not thousands of police calls handled by Plaintiff, an audio recording which captured the circumstances of how Plaintiff came into possession of the knife.

22. Using Plaintiff's compelled statements and fruits thereof against him, Chief Scheibler requested the Kansas Bureau of Investigation to initiate a criminal investigation and suspended the internal investigation on or about December 22, 2013.

23. Lt. Wright produced all evidence gathered in his internal investigation, including Plaintiff's compelled statements and fruits thereof, to the criminal investigator for use in the criminal proceedings against Plaintiff.

24. Because of the criminal investigation, the Haysville police department withdrew its offer of employment to Plaintiff.

25. Using Plaintiff's compelled statements and fruits thereof against him, Plaintiff was charged in early 2014 with two felony counts related to his possession of the knife in Case No 14CR-285 in the Ellis County, Kansas district court.

26. At Plaintiff's probable cause hearing in late 2014, Plaintiff's compelled statements and fruits thereof were used against him in a criminal case.

27. In separate rulings, a state magistrate judge and a state district court judge both determined that probable cause did not exist to bind Plaintiff over for

trial and Plaintiff was dismissed from the criminal charges in early 2015.

Count I: Fifth Amendment – Freedom from Self-Incrimination

(versus Haysville, Whitfield, Sexton)

28. Plaintiff hereby incorporates by reference paragraphs 1 through 27 above as if fully set forth herein.
29. 42 U.S.C. § 1983 provides for recovery of damages for constitutionally-protected rights under color of state law.

30. Under color of law, Defendants Haysville, Sexton, and Whitfield compelled Plaintiff to report his keeping of the knife and to tender the knife to the Hays police department as a condition of government employment, which violated Plaintiff's Fifth Amendment right to be free from self-incrimination when ultimately used against him in a criminal case.

31. As a result of Defendants' conduct, Plaintiff suffered, and continues to suffer, loss of income, emotional distress, pain and suffering, mental anguish, humiliation, loss of life enjoyment, damage to reputation, and inconvenience.

32. The acts, conduct and behavior of Defendants were willful, wanton, malicious, and outrageous, showed disregard for Plaintiff's rights, and were performed knowingly, intentionally and maliciously, by reason of which Plaintiff is entitled to an award of punitive damages in an amount to be proved at trial.

33. Plaintiff is entitled to recover from the Defendants reasonable attorneys' fees and expenses, as provided by 42 U.S.C. § 1988.

WHEREFORE, Plaintiff requests that this Court, after a trial by jury, enter judgment against Defendants for his actual damages, nominal damages, and punitive or exemplary damages as are proven at trial, for attorneys' fees and expenses pursuant to § 1988, for costs incurred herein, and for any such further legal and equitable relief as this Court deems appropriate.

Count II: Fifth Amendment – Freedom from Self-Incrimination

(versus Hays, Scheibler, Wright)

34. Plaintiff hereby incorporates by reference paragraphs 1 through 27 above as if fully set forth herein.

35. 42 U.S.C. § 1983 provides for recovery of damages for constitutionally-protected rights under color of state law.

36. Under color of law, Defendants Hays, Scheibler, and Wright:

A. Compelled Plaintiff to submit a written report addressing his possession of the knife as a condition of government employment, which violated Plaintiff's Fifth Amendment right to be free from self-incrimination when ultimately used against him in a criminal case.

B. Compelled Plaintiff to provide a purportedly internal statement as a condition of government employment, which violated Plaintiff's Fifth Amendment right to be free from self-incrimination when ultimately used against him in a criminal case, and

C. Provided the purportedly internal investigation file containing compelled statements and fruits thereof to a criminal investigator for use

in criminal proceedings, which violated Plaintiff's Fifth Amendment right to be free from self-incrimination when ultimately used against him in a criminal case.

37. As a result of Defendants' conduct, Plaintiff suffered, and continues to suffer, loss of income, emotional distress, pain and suffering, mental anguish, humiliation, loss of life enjoyment, damage to reputation, and inconvenience.

38. The acts, conduct and behavior of Defendants were willful, wanton, malicious, and outrageous, showed disregard for Plaintiff's rights, and were performed knowingly, intentionally and maliciously, by reason of which Plaintiff is entitled to an award of punitive damages in an amount to be proved at trial.

39. Plaintiff is entitled to recover from the Defendants reasonable attorneys' fees and expenses, as provided by 42 U.S.C. § 1988.

WHEREFORE, Plaintiff requests that this Court, after a trial by jury, enter judgment against Defendants for his actual damages, nominal damages, and punitive or exemplary damages as are proven at trial, for attorneys' fees and expenses pursuant to § 1988, for costs incurred herein, and for any such further legal and equitable relief as this Court deems appropriate.

JURY TRIAL DEMAND

40. Plaintiff demands a jury trial on all issues.

DESIGNATION OF PLACE OF TRIAL

41. Plaintiff designates Wichita, Kansas as the place of trial.

Respectfully Submitted,

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RECORD AND BRIEFS

Supreme Court, U.S.
FILED
AUG 16 2017
OFFICE OF THE CLERK

No. 16-1495

IN THE

Supreme Court of the United States

CITY OF HAYS, KANSAS,

Petitioner,

v.

MATTHEW JACK DWIGHT VOGT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself."

The question presented is:

Whether the Court of Appeals correctly held that the Fifth Amendment applies not only to the prosecution's use of compelled statements at a criminal trial, but also to the prosecution's use of such statements in pretrial proceedings, including probable cause hearings.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 3

Officer Vogt Is Compelled To Make Statements, Which Are Then Used To Initiate And Support A Criminal Case Against Him. 3

Officer Vogt Sues Alleging A Fifth Amendment Violation, And The District Court Dismisses The Case. 4

The Tenth Circuit Reinstates Officer Vogt's Fifth Amendment Claim. 5

REASONS TO DENY CERTIORARI 7

I. The Circuit Conflict Portrayed In The Petition Does Not Exist, And The Tenth Circuit Followed The Consensus View That The Right Against Self-Incrimination Is Not Just A Trial Right 7

II. The Tenth Circuit Correctly Interpreted The Fifth Amendment's Language And History And This Court's Precedent In Concluding That The Right Against Self-Incrimination Is Not Just A Trial Right 14

III. This Case Is Not A Suitable Vehicle For The Court's Review 19

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Best v. City of Portland,
554 F.3d 698 (7th Cir. 2009) 9

Burrell v. Virginia,
395 F.3d 508 (4th Cir. 2005) 10, 11

Chavez v. Martinez,
538 U.S. 760 (2003) 2, 14, 16, 17

Garrity v. New Jersey,
385 U.S. 493 (1967) 7, 22

Giuffre v. Bissell,
31 F.3d 1241 (3d Cir. 1994)..... 13

Higazy v. Templeton,
505 F.3d 161 (2d Cir. 2007)..... 9, 17

Kastigar v. United States,
406 U.S. 441 (1972) 19

Murray v. Earle,
405 F.3d 278 (5th Cir. 2005) 11

Renda v. King,
347 F.3d 550 (3d Cir. 2003)..... 12, 13

Smith v. Patterson,
430 F. App'x 438 (6th Cir. 2011)..... 14

Sornberger v. City of Knoxville,
434 F.3d 1006 (7th Cir. 2006) 8, 9, 17

State v. Mems,
708 N.W.2d 526 (Minn. 2006) 14

Stoot v. City of Everett,
582 F.3d 910 (9th Cir. 2009) 9, 10, 17

Tinker v. Beasley,
429 F.3d 1324 (11th Cir. 2005) 14

United States v. Abuhamra,
389 F.3d 309 (2d Cir. 2004) 16

United States v. Calandra,
414 U.S. 338 (1974) 18

United States v. Williams,
504 U.S. 36 (1992) 18, 19

Weaver v. Brenner,
40 F.3d 527 (2d Cir. 1994) 9

Winslow v. Smith,
696 F.3d 716 (8th Cir. 2012) 12

Constitutional Provisions

U.S. Const. amend. V 2, 5, 14

U.S. Const. amend. VI 15

U.S. Const. amend. VII 15

Statutes

42 U.S.C. § 1983 ..... 1, 4, 20

Other Authorities

Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination As A "Trial Right" in* Chavez v. Martinez, 70 Tenn. L. Rev. 987 (2003) 15

Leonard W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* (1968) 15

INTRODUCTION

Respondent Matthew Vogt was a police officer employed by Petitioner City of Hays, Kansas ("the City" or "Hays"). The City compelled Officer Vogt to make incriminating statements as a condition of keeping his job, and then used those statements to initiate and support a criminal case against him. The prosecution used Officer Vogt's compelled statements against him at a probable cause hearing, but a state court dismissed the criminal charges before it ever got to trial.

In Officer Vogt's action under 42 U.S.C. § 1983 alleging a violation of the Fifth Amendment, the district court granted the City's motion to dismiss, ruling that there can be no violation of the right against self-incrimination unless the prosecution introduces the statement in a criminal trial. The Court of Appeals reversed and remanded for further proceedings, holding that the protection against self-incrimination is not limited to the use of compelled statements at trial, but also extends to the use of such statements in pretrial criminal proceedings like the probable cause hearing in this case.

The Petition urges that this holding implicates a circuit conflict, but the split it portrays does not exist. The Tenth Circuit followed the consensus view—articulated in decisions of the Second, Seventh, and Ninth Circuits—that the Constitution's protection against self-incrimination applies not only with respect to criminal trials but also to other parts of a criminal case, like bail hearings, arraignments, and probable cause hearings. The City asserts that other

circuits have come to the opposite conclusion, but it mischaracterizes those courts' decisions, and there is no contrary line of circuit authority.

The Tenth Circuit's decision is also correct. The Fifth Amendment's text applies explicitly to "any criminal case," U.S. Const. amend. V, not just to a trial. As the Court of Appeals explained, the provision's history also shows that it is not limited to criminal "trials." And the separate opinions in *Chavez v. Martinez*, 538 U.S. 760 (2003), also indicate that the right against self-incrimination is not just a trial right, but may be implicated when compelled statements form the basis for criminal charges and when the prosecution uses such statements in a judicial proceeding.

This case is also an unsuitable vehicle for this Court's review. The Court of Appeals' decision is interlocutory in nature; it merely reversed the district court's threshold grant of the City's motion to dismiss, and remanded the matter for further proceedings in district court. Moreover, the City's position in this litigation is that it is entitled to prevail on Officer Vogt's Fifth Amendment claim for multiple reasons wholly independent of the question it seeks to present for this Court's review. And, Judge Hartz's concurrence in the decision below, "emphasiz[ing] the limits" of the panel's ruling (Pet. App. 33a), further underscores that certiorari is unwarranted.

This Court should deny the Petition.

STATEMENT OF THE CASE

Officer Vogt Is Compelled To Make Statements, Which Are Then Used To Initiate And Support A Criminal Case Against Him.

Respondent Matthew Vogt was a police officer working for Petitioner City of Hays. In late 2013, he applied for a job with the police department of the City of Haysville, Kansas, a separate municipality. During the hiring process, he disclosed that he had kept a knife that he obtained while working as a Hays police officer. The City of Haysville offered Officer Vogt a job, conditioned upon his reporting and returning the knife to the City of Hays. Pet. App. 2a-3a, 48a.

Officer Vogt reported and returned the knife to the Hays police department. The Hays police chief ordered him to submit a written report concerning his possession of the knife, and Officer Vogt complied with the order. Pet. App. 3a. Officer Vogt then gave the City of Hays a two-week notice, intending to accept the new job with the City of Haysville. *Id.*

Meanwhile, the Hays police chief opened an internal investigation into Officer Vogt's possession of the knife. A Hays police officer directed Officer Vogt to provide a more detailed account regarding the knife in order to keep his job with the City of Hays. Officer Vogt again complied, and the Hays police used the additional statement to locate additional evidence. Pet. App. 3a, 49a-50a.

Based on Officer Vogt's statements and the additional evidence, the Hays police chief asked the Kansas Bureau of Investigation to start a criminal investigation. In conjunction with this request, the Hays police department provided the Kansas Bureau of Investigation with Officer Vogt's statements and the additional evidence. The Kansas Bureau of Investigation undertook a criminal investigation, and the investigation led the Haysville police department to withdraw its job offer. Pet. App. 3a, 50a.

Officer Vogt was ultimately charged in Kansas state court with two felony counts related to his possession of the knife. The state trial court conducted a probable cause hearing in which the prosecution introduced Officer Vogt's compelled statements and additional evidence that law enforcement developed based on those statements. The state court determined that the prosecution lacked probable cause to support the charges. The court accordingly dismissed the case. Pet. App. 3a, 50a-51a.

Officer Vogt Sues Alleging A Fifth Amendment Violation, And The District Court Dismisses The Case.

After the state court dismissed the criminal charges against him, Officer Vogt filed this action under 42 U.S.C. § 1983 against the City of Hays, the City of Haysville, and specified Hays and Haysville officials in their individual and official capacities. The complaint alleged that the use of his compelled statements to initiate and support a criminal case against him, including use of the statements at the probable cause hearing, violated his Fifth Amendment right

against self-incrimination. Pet. App. 1a, 3a-4a, 46a-54a. The defendants, including the City of Hays, filed motions to dismiss under Fed. R. Civ. P. 12(b)(6).

The district court granted the dismissal motions, holding that Officer Vogt failed to state a claim under the Fifth Amendment because his compelled statements were never admitted against him at a criminal trial. Pet. App. 35a-44a. The district court recognized that "this case turns on whether the compelled statements were used in a criminal proceeding." Pet. App. 39a. The court then reasoned that, because "the compelled statements were never introduced against Vogt at trial," he "fail[ed] to state a violation of his Fifth Amendment rights." Pet. App. 43a-44a.

The Tenth Circuit Reinstates Officer Vogt's Fifth Amendment Claim.

The Court of Appeals affirmed in part and reversed in part, and remanded for further proceedings. Pet. App. 2a, 33a.

The Court of Appeals reversed the district court's holding that there cannot be a Fifth Amendment violation unless the compelled statements are admitted at a criminal trial. The court first looked to the text of the Fifth Amendment, which provides that "No person shall be 'compelled in any criminal case to be a witness against himself.'" Pet. App. 10a (quoting U.S. Const. amend. V). The court noted that the text employs the broad term "criminal case," and does not limit its scope to a criminal "trial" or "prosecution." *Id.* The Court of Appeals also examined the evidence of the Framers' understanding of the right against self-

incrimination, and concluded that consistent with the applicable constitutional text the "Founders apparently viewed the right more broadly" than just a trial right, "envisioning it to apply beyond the trial itself." Pet. App. 19a; *see id.* at 11a-19a. The Court of Appeals observed as well that other Circuits have addressed the question and that the Second, Seventh, and Ninth Circuits have all concluded that the prosecution's use of compelled statements in the context of pretrial proceedings such as bail hearings, suppression hearings, arraignments, and probable cause hearings violates the Fifth Amendment. Pet. App. 6a-7a. For all of these reasons, and because Officer Vogt "alleged that his compelled statements had been used in a probable cause hearing," the court held that Officer Vogt had "adequately pleaded a Fifth Amendment violation consisting of the use of his statements in a criminal case." Pet. App. 20a.

The Court of Appeals accordingly remanded Officer Vogt's claims against the City of Hays for further proceedings in the district court. Pet. App. 33a. In remanding the matter to the district court, the Court of Appeals noted that the City takes the position that it is entitled to prevail on Officer Vogt's Fifth Amendment claim regardless of whether the protection against self-incrimination extends to the use of compelled statements in pretrial criminal proceedings. In particular, the City has asserted that it cannot be held liable for any Fifth Amendment violation even if one occurred, because a separate entity, the State of Kansas, actually filed and conducted the criminal case against Officer Vogt, and because the Hays officials who undertook any conduct attributable to Hays, including its police chief, had no ultimate policymaking

authority. On these points, the Court of Appeals held that the allegations in the complaint were sufficient to survive a motion to dismiss, and that these issues could be explored further in the proceedings on remand in district court. Pet. App. 26a-32a.

Although it reversed and remanded with respect to the City of Hays, the Court of Appeals affirmed the district court's dismissal of Officer Vogt's remaining claims on grounds not relevant here. Pet. App. 20a-26a.

Judge Hartz issued a short concurrence, agreeing with the panel's judgment and reasoning, and noting several issues regarding the Fifth Amendment and *Garrity v. New Jersey*, 385 U.S. 493 (1967), that the panel had not addressed or resolved. Pet. App. 33a-34a.

REASONS TO DENY CERTIORARI

This Court should deny the Petition because the circuit conflict that the Petition portrays does not exist, the Tenth Circuit's decision is correct, and this case in any event is not a suitable vehicle for this Court's review. Certiorari is unwarranted.

I. The Circuit Conflict Portrayed In The Petition Does Not Exist, And The Tenth Circuit Followed The Consensus View That The Right Against Self-Incrimination Is Not Just A Trial Right.

The Petition's depiction of a circuit split is inaccurate. The Tenth Circuit here agreed with holdings of

the Second, Seventh, and Ninth Circuits, and there is no line of circuit authority on the other side.

A. In holding that the Fifth Amendment's protection against self-incrimination extends beyond the prosecution's use of compelled statements at trial, the Tenth Circuit expressly followed decisions to that effect by the Second, Seventh, and Ninth Circuits. Pet. App. 7a.

The Seventh Circuit first analyzed this issue in 2006, when it considered the Fifth Amendment claims of a couple mistakenly arrested and charged with bank robbery. *Sornberger v. City of Knoxville*, 434 F.3d 1006, 1009-12 (7th Cir. 2006). During the investigation, the wife falsely stated that she assisted her husband with the robbery, and police used her statements "to develop probable cause sufficient to charge her and initiate a criminal prosecution." *Id.* at 1025. The police subsequently identified the actual culprit, and the prosecution dropped the charges. *Id.* at 1012. In the ensuing § 1983 action, the complaint alleged that the police coerced the wife's confession. The Seventh Circuit held that the compelled statements "were used against her in a 'criminal case' and in a manner that implicates the Self-Incrimination Clause." *Id.* at 1026. Specifically, before dropping the charges, the prosecution introduced the confession at a preliminary hearing "to determine whether probable cause existed to allow the case against her to go to trial." *Id.* The court concluded that where "a suspect's criminal prosecution was not only initiated, but was commenced *because* of her [compelled] confession, the 'criminal case' contemplated by the Self-Incrimination Clause has begun." *Id.* at 1026-27 (emphasis in

original). The court specifically "refuse[d] to hold that the right against self-incrimination cannot be violated unless a [compelled statement] is introduced in the prosecution's case-in-chief at trial." *Id.* at 1027 n.15. *See also Best v. City of Portland*, 554 F.3d 698, 702-03 (7th Cir. 2009) (reaffirming *Sornberger* and holding that a suppression hearing is part of a "criminal case" under the Fifth Amendment).

A year later, the Second Circuit joined the Seventh Circuit in rejecting the notion that a Fifth Amendment violation occurs only if the prosecution uses a compelled statement at trial. *Higazy v. Templeton*, 505 F.3d 161 (2d Cir. 2007). There, the defendant claimed that use of a compelled statement at his bail hearing violated his Fifth Amendment right against self-incrimination. *Id.* at 170, 172-73. The Second Circuit agreed, holding that the defendant's initial appearance at his bail hearing "was part of [his] criminal case," such that the prosecutor's use of his compelled confession at the hearing constituted a Fifth Amendment violation. *Id.* at 173. The Second Circuit reaffirmed its earlier ruling that "use or derivative use of a compelled statement at any criminal proceeding" violates the defendant's rights against self-incrimination under the Fifth Amendment, and "use of the statement at trial is not required." *Id.* (quoting *Weaver v. Brenner*, 40 F.3d 527 (2d Cir. 1994)).

Most recently, the Ninth Circuit "join[ed] the Second and Seventh Circuits in holding that use of ... statements at trial is not necessary for [a defendant] to assert a claim for violation of his rights under the Fifth Amendment." *Stoot v. City of Everett*, 582 F.3d

910, 925 (9th Cir. 2009), *cert. denied*, 559 U.S. 1057 (2010). There, police questioned a minor about allegations of sexual abuse of a younger child and obtained the minor's confession. Prosecutors used the confession to file criminal charges and also introduced it at a pretrial arraignment and bail hearing. *Id.* at 912, 923. The Ninth Circuit concluded that a "coerced statement has been 'used' in a criminal case when it has been relied upon to file formal charges against the declarant, to determine judicially that the prosecution may proceed, and to determine pretrial custody status." *Id.* at 925.

B. The Petition asserts that these decisions are in conflict with decisions from the Third, Fourth, Fifth, and Eighth Circuits. Pet. 6-8. That assertion is incorrect. The City manufactures this purported split by mischaracterizing the holdings of those cases. While the Petition highlights some stray language that seems supportive of the City's position, the split it portrays does not exist.

In *Burrell v. Virginia*, 395 F.3d 508 (4th Cir. 2005), the plaintiff was involved in a car accident, and when he refused to produce documentation of his car insurance the police officer on the scene issued summonses for him to appear in court. The plaintiff then sued, alleging that compelling the production of proof of insurance violated his Fifth Amendment rights. *Id.* at 510-11. The Fourth Circuit rejected the Fifth Amendment claim because the plaintiff alleged no improper "courtroom" or "trial" conduct. *See id.* at 513-14. The court did not limit the right against self-incrimination to the use of compelled statements at a criminal trial; to the contrary, the court emphasized

that "Burrell *only* claim[ed] that his constitutional rights were violated at the time the summonses were issued." *Id.* at 513 n.4 (emphasis in original). The Fourth Circuit in *Burrell* thus did not consider whether prosecutors' use of compelled statements in a pretrial judicial proceeding, such as a bail hearing or a probable cause hearing, violated the Fifth Amendment; instead, it considered only the very different question whether an officer violates the Fifth Amendment by issuing a summons for failure to provide proof of insurance.

In *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005), the Fifth Circuit likewise did not analyze whether the right against self-incrimination protects against the use of compelled statements in pretrial proceedings because the prosecution had used the plaintiff's compelled statements at her criminal trial. There, officers questioned an 11-year-old girl and elicited a confession that was admitted at trial and resulted in her conviction. *Id.* at 284. A state appellate court later reversed the conviction, and the girl brought a civil rights action. The City fixates on the Fifth Circuit's passing statement that the "privilege against self-incrimination is a fundamental trial right which can be violated only *at* trial." *Id.* at 285 & n.11. But that language was dicta, because, as noted, the statements there *were* admitted and used at trial. Moreover, the Fifth Circuit ultimately concluded that, "as [the plaintiff] cannot demonstrate that the acts of the defendants in obtaining her confession proximately caused the violation of her Fifth Amendment rights, we hold that she may not maintain against the defendants ... a claim under § 1983." *Id.* at 296; *see id.* at 292-93. Thus, the disposition of the case turned on a causation

point in any event, and not on any decision regarding the scope of the Fifth Amendment.

And in *Winslow v. Smith*, 696 F.3d 716 (8th Cir. 2012), the Eighth Circuit similarly did not analyze whether the right against self-incrimination is just a trial right, because the plaintiffs there did not allege any use of their compelled statements in *any* criminal proceeding—whether pretrial or trial. In *Winslow*, the four plaintiffs, previously criminal defendants, had entered pleas of guilty, nolo contendere, or no contest to rape and murder charges, but they later received full pardons. *Id.* at 727-30. They then sued state officials alleging violations of multiple constitutional rights. *Id.* The Eighth Circuit referenced plaintiffs' self-incrimination claims in a footnote, stating that those claims failed because "Plaintiffs did not proceed to a criminal trial." *Id.* at 731 n.4. But the court at no point addressed whether the use of compelled statements in pretrial proceedings—had any such use occurred—could have triggered the privilege against self-incrimination. So, like *Burrell* and *Murray*, *Winslow* presents no holding on the issue that the Tenth Circuit confronted and addressed in this case.

The only circuit that even arguably holds that the Fifth Amendment right against self-incrimination is just a trial right is the Third Circuit, in *Renda v. King*, 347 F.3d 550 (3d Cir. 2003), and that case is distinguishable. In *Renda*, officers interviewed a suspect without providing *Miranda* warnings, and they used her statement to charge her with giving false reports to law enforcement. *Id.* at 552-53. The state trial court, however, later suppressed her statement, *id.* at 553, and the prosecution dropped the charges. In her

§ 1983 suit against state officials, the Third Circuit recognized that the prosecution used plaintiff's statement against her in "one sense," *id.* at 559, *i.e.*, as the basis for bringing criminal charges, but it concluded that its "prior decision in *Giuffre*" *v. Bissell,* 31 F.3d 1241 (3d Cir. 1994), "compels the conclusion that it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution." *Renda*, 347 F.3d at 559. *Giuffre* was a qualified immunity case that addressed whether it was "clearly established" at the time of the events in that case that obtaining statements in violation of *Miranda* could transgress the Fifth Amendment, "even though those statements were never used against the plaintiff in a court of law," *Giuffre*, 31 F.3d at 1256. Unlike *Renda* and *Giuffre*, this is not a *Miranda* case and Officer Vogt's compelled statements were affirmatively used against him in a judicial probable cause hearing, and not just in filing charges.

In sum, of the four circuits that the City claims have held that the Fifth Amendment privilege against self-incrimination is just a trial right, only one even purports to hold as much, and, as shown above, that case is distinguishable in any event. The other cases that the Petition cites contain at most drive-by dicta that the Petition cobbles together to give the impression of an established circuit split where there is none. The Tenth Circuit here properly followed the Second, Seventh, and Ninth Circuits in holding that the Fifth Amendment's protection against self-incrimination is not limited to the use of compelled statements at a criminal trial but instead may also extend to the use of such statements in pretrial proceedings. Any cir-

cuit conflict on that issue is at best shallow and undeveloped, and at least at this time is not worthy of this Court's review.[1]

II. The Tenth Circuit Correctly Interpreted The Fifth Amendment's Language And History And This Court's Precedent In Concluding That The Right Against Self-Incrimination Is Not Just A Trial Right.

The decision of the Tenth Circuit is correct. It draws strong support from the Fifth Amendment's text and history, and from the multiple opinions in *Chavez v. Martinez*, 538 U.S. 760 (2003).

A. As the Court of Appeals noted, the text of the Fifth Amendment provides that "No person shall ... be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Thus, the constitutional language refers broadly to "any criminal case," and is not limited to "criminal trials" or "criminal prosecutions." The Court of Appeals properly concluded that the broad wording of the Self-Incrimination Clause militates against a restrictive

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[1] The Petition also cites *Smith v. Patterson*, 430 F. App'x 438 (6th Cir. 2011), but that decision is unpublished and thus is not binding or precedential in the Sixth Circuit. And the Minnesota Supreme Court case that the Petition cites is also inapposite. In *State v. Mems*, 708 N.W.2d 526, 534 (Minn. 2006), the defendant alleged that his privilege against self-incrimination was violated because he received an inadequate *Miranda* warning. *Id.* at 534. He did not claim that any statement he made was wrongfully used in any courtroom proceeding, whether at trial or otherwise. *See also Tinker v. Beasley*, 429 F.3d 1324, 1328 n.7 (11th Cir. 2005) ("Tinker never made any incriminating statement.") (cited at Pet. 7).

reading that would limit its protections to the use of compelled statements at a criminal trial and that would not extend to the use of such statements in pretrial proceedings. "If the Framers had meant to restrict the right to 'trial,' they could have said so." Pet. App. 13a-14a (quoting Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination As A "Trial Right" in* Chavez v. Martinez, 70 Tenn. L. Rev. 987, 1014 (2003)).

The fact that the Constitution in other places employs narrower language further bolsters this conclusion. In particular, as the Court of Appeals noted, the omission of the terms "trial" or "criminal prosecution" from the Fifth Amendment's text stands in contrast to the Sixth and Seventh Amendments, where the constitutional text expressly employs those terms. Pet. App. 10a-11a; U.S. Const. amends. VI, VII. As the Court of Appeals explained, where the Constitution employs a particular verbal formulation in one provision, and a different verbal formulation in another provision, the courts must respect the distinction. Pet. App. 10a-11a; *see also* Pet. App. 17a-18a (citing Leonard W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* 427 (1968)).

The Court of Appeals also examined the evidence of the intent underlying the language of the Fifth Amendment. The court concluded that "[t]he Founders' understanding of the term 'case' suggests that the Fifth Amendment encompasses more than the trial itself." Pet. App. 13a. And for good reason: Pretrial proceedings no less than trials on the merits may impinge upon a defendant's liberty. *See, e.g., United*

States v. Abuhamra, 389 F.3d 309, 324 (2d Cir. 2004) ("[B]ail hearings determine whether a defendant will be allowed to retain, or forced to surrender, his liberty during the pendency of his criminal case."). By applying the privilege to all aspects of a "criminal case," the Tenth Circuit's decision preserves the Fifth Amendment's historical role as a bulwark protecting the individual against the power of the state.

B. This Court in *Chavez v. Martinez*, 538 U.S. 760 (2003), touched upon but did not resolve the question presented in this case. *Chavez* involved a police interrogation of an injured suspect. The state filed no criminal charges against the individual, and the question in the § 1983 context was whether the officer violated the Fifth Amendment by eliciting incriminating statements, even though the statements never made their way into any criminal proceeding. The Court's answer was no.

Chavez yielded no majority opinion. Justice Thomas' plurality opinion (for four Justices) stated that the existence of a "criminal case" within the meaning of the Fifth Amendment "at the very least requires the initiation of legal proceedings." *Id.* at 766. Justice Souter's concurring opinion (for two Justices) observed similarly that "the text of the Fifth Amendment ... focuses on courtroom use of a criminal defendant's compelled, self-incriminating testimony." *Id.* at 777. Justice Stevens' concurring and dissenting opinion added that the Fifth Amendment's privilege against self-incrimination "is the most specific provision in the Bill of Rights that protects all citizens from the kind of custodial interrogation that was once employed by the Star Chamber [and] by the Germans of

the 1930's and early 1940's." *Id.* at 788 (internal quotation marks omitted). And Justice Kennedy's concurring and dissenting opinion (for three Justices) took the view that "the Self-Incrimination Clause is applicable at the time and place police use compulsion to extract a statement from a suspect. The Clause forbids that conduct." *Id.* at 795.

Although *Chavez* did not decide the "precise moment when a 'criminal case' commences," *Id.* at 766-67, the various opinions suggest that the protection against self-incrimination is more than just a trial right. "[E]xtract[ion]" (*id.* at 795 (Kennedy, J.)) of a compelled statement may occur long before any criminal trial. Likewise, "the initiation of legal proceedings" (*id.* at 766 (Thomas, J.)) will typically take place prior to a trial. And "courtroom use of a criminal defendant's compelled, self-incriminating testimony" (*id.* at 777 (Souter, J.)) can arise in any number of pretrial settings, including, for example, bail hearings, suppression hearings, arraignments, and probable cause hearings. Taken together, the separate opinions in *Chavez* indicate that the protection against self-incrimination applies not only to the prosecution's use of compelled statements at a criminal trial, but may also extend to the prosecution's use of such statements in pretrial criminal proceedings. *See* Pet. App. 5a-6a; *Stoot*, 582 F.3d at 922-25; *Higazy*, 505 F.3d at 171-73; *Sornberger*, 434 F.3d at 1023-27.

C. The Petition invokes the proposition that criminal defendants generally may not challenge an indictment on the ground that the evidence before the grand jury included the defendant's compelled statements. *See* Pet. 11. But the Petition draws the wrong

conclusion from that premise. The principle that the City seeks to invoke does not reflect the fact that the Fifth Amendment cannot apply before trial; it reflects the fact that the grand jury is a distinct institution governed by a special body of rules.

As this Court has explained, the grand jury "is a constitutional fixture in its own right"; "it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people"; it "deliberates in total secrecy"; and it may operate on an *ex parte* basis and "hear only the prosecutor's side." *United States v. Williams*, 504 U.S. 36, 47-51 (1992). In light of the distinct nature of the grand jury, "certain constitutional protections afforded defendants in criminal proceedings have no application before that body," including the Double Jeopardy Clause and the Fourth Amendment's exclusionary rule. *Id.* at 49. That is why this Court's "cases suggest that an indictment obtained through the use of evidence previously obtained in violation of the privilege against self-incrimination 'is nevertheless valid.'" *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 346 (1974)). These precepts by their terms turn on the grand jury's special role and function; they do not stand for any larger point that the Fifth Amendment's protections against self-incrimination apply only at trial and do not extend to pretrial courtroom proceedings like probable cause hearings.

Indeed, even on its own terms, the Petition is simply mistaken in suggesting that the Fifth Amendment categorically does not apply in the grand jury context. *See* Pet. 11, 12. It is settled that witnesses

called upon to testify before the grand jury may invoke their Fifth Amendment rights against self-incrimination, and may obtain use immunity encompassing their testimony. *See Williams*, 504 U.S. at 49; *Kastigar v. United States*, 406 U.S. 441 (1972). A defendant who has received such immunity may request a hearing in court to ensure that his prosecution does not improperly rely upon immunized testimony. *Kastigar*, 406 U.S. at 460-61.

III. This Case Is Not A Suitable Vehicle For The Court's Review.

Even if the question presented were otherwise suited for this Court's review, the interlocutory posture of this case makes it a poor vehicle for the Court to resolve it.

A. The Court of Appeals did not resolve one way or another whether the City is liable on Officer Vogt's Fifth Amendment claim. It merely reversed the district court's dismissal of that claim under Fed. R. Civ. P. 12(b)(6), and remanded the matter to the district court for further proceedings. Pet. App. 33a. Thus, under the terms of the Court of Appeals' ruling, this litigation will proceed in district court, and its ultimate disposition is as yet unknown. Against this backdrop, there is at this juncture no need or reason for this Court's intervention.

B. Moreover, the City has taken the position that it is legally entitled to prevail on Officer Vogt's Fifth Amendment claim on at least two separate grounds wholly independent of the question that it seeks to present for this Court's review. The City's insistence

that it is entitled to prevail on the Fifth Amendment claim regardless of the resolution of the question presented in its Petition further militates against this Court's review.

The City takes the position in this litigation that "it did not cause a violation of the Fifth Amendment," even if a Fifth Amendment violation otherwise occurred. Pet. App. 27a. "Rather, Hays submits that it merely gave Mr. Vogt's compelled statements to the Kansas Bureau of Investigation, pointing out that Hays did not make the decision to pursue criminal charges or to use the statements in pretrial proceedings." *Id.*

The Court of Appeals rejected this argument for purposes of the City's threshold motion to dismiss. It explained that "Section 1983 imposes liability on a state actor who 'causes to be subjected ... any citizen ... to the deprivation of any rights'" (quoting 42 U.S.C. § 1983); that "causation exists if Hays initiated actions that it knew or reasonably should have known would cause others to deprive Mr. Vogt of his right against self-incrimination"; and that, "[a]ccordingly, Hays could incur liability even if it had been someone else who used the compelled statements in a criminal case." Pet. App. 27a-28a. The Court of Appeals continued that, "[t]aking the[] [complaint's] allegations as true, we conclude that Mr. Vogt adequately pleaded that Hays had started a chain of events that resulted in violation of the Fifth Amendment." Pet. App. 28a.

Separately and independently, the City likewise maintains that, to the extent that its police chief's conduct is attributable to the City, it nonetheless

"cannot incur liability for actions by the Hays police chief because he was not a final policymaker for the city." Pet. App. 29a. The Court of Appeals rejected this proposition too for purposes of the City's motion to dismiss, explaining that "Mr. Vogt pleaded facts indicating that the Hays police chief was a final policymaker on the requirements for police employees." Pet. App. 29a. The Court of Appeals explained that "[t]he complaint alleges that the Hays police chief had final policymaking authority for the police department," and "[t]here is nothing in the complaint to suggest that his decisions were subject to further review up the chain-of-command." Pet. App. 30a. "The absence of such provisions is fatal at this stage," the Court of Appeals observed, "where we must view all of the allegations and draw all reasonable inferences in favor of Mr. Vogt." Pet. App. 32a. "As a result, we conclude that Mr. Vogt has adequately pleaded final policymaking authority on the part of the Hays police chief." *Id.*

In short, the City's stance has been and presumably will remain that for at least two different reasons it is entitled to prevail on Officer Vogt's Fifth Amendment claim wholly apart from the question presented in its Petition: whether the protection against self-incrimination applies only with respect to the prosecution's use of compelled statements at criminal trials or whether, instead, it extends more broadly to the prosecution's use of such statements in pretrial proceedings like the probable cause hearing in this case. That the question presented is thus in the City's view not outcome-determinative of Officer Vogt's Fifth Amendment claim weighs against this Court's granting review.

C. Judge Hartz's concurrence provides additional reasons why the Petition should be denied. As noted, the concurrence identifies several questions pertaining to the Fifth Amendment and *Garrity v. New Jersey*, 385 U.S. 493 (1967), that the Court of Appeals did "not answer[]." Pet. App. 33a. The concurrence's listing of issues that the parties as appropriate are thus free to pursue on remand in the district court further underscores that this Court's needless and premature involvement in this case would be unwarranted.

CONCLUSION

The Court should deny the Petition.

Respectfully submitted,

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RECORD AND BRIEFS

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In the Supreme Court of the United States

CITY OF HAYS, KANSAS, PETITIONER

v.

MATTHEW JACK DWIGHT VOGT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

A. The Split Is Real 1

B. The Tenth Circuit's Decision Is Wrong 4

C. There Are No Vehicle Problems 5

Conclusion 6

TABLE OF AUTHORITIES

Cases

Best v. *City of Portland*, 554 F.3d 698 (7th Cir. 2009) 3
Board of County Com'rs v. *Umbehr*, 518 U.S. 668 (1996) 6
Brooks v. Luther, Civ. Act. No. 15–6707 (JBS–KMW), 2017 WL 626711 (D.N.J., Feb. 15, 2017) 2
Burno v. *Kolich*, Civ. No. 07–4863 (FSH), 2008 WL 323614 (D.N.J., Feb. 4, 2008) 2
Chavez v. *Martinez*, 538 U.S. 760 (2003) 3, 4
Cook County v. *United States ex rel. Chandler*, 538 U.S. 119 (2003) 6
Garrity v. *New Jersey*, 385 U.S. 493 (1967) 2
Higazy v. *Templeton*, 505 F.3d 161 (2d Cir. 2007) 3
Inyo County v. *Paiute–Shoshone Indians of the Bishop Comm. of the Bishop Colony*, 538 U.S. 701, (2003) 6
Ojo v. *Luong*, Civ. Act. No. 14–4347 (JLL), 2016 WL 1337274 (D.N.J., Apr. 5, 2016) 2
Polk County v. *Dodson*, 454 U.S. 312 (1981) 6
Renda v. *King*, 347 F.3d 550 (3d Cir. 2003) 1, 2
Sornberger v. *City of Knoxville*, 434 F.3d 1006 (7th Cir. 2006) 3
Stoot v. *City of Everett*, 582 F.3d 910 (9th Cir. 2009), cert. denied, 559 U.S. 1057 (2010) 3
Town of Castle Rock v. *Gonzales*, 545 U.S. 748 (2005) 6
Town of Newton v. *Rumery*, 480 U.S. 386 (1987) 6
United States v. *Williams*, 504 U.S. 36 (1992) 4

Constitutional Provisions

U.S. Const. amend. V 4

REPLY BRIEF FOR THE PETITIONER

A. The Split Is Real

Although the district court ruled for petitioner and the court of appeals for respondent, both courts below agreed on one thing: "The Circuits * * * are split on this issue." Pet. App. 41a (district court); accord *id.* at 6a (court of appeals) (noting "a circuit split * * * over the definition of a 'criminal case' under the Fifth Amendment."). Before the Tenth Circuit, respondent himself acknowledged that this case "addresses an important matter of Constitutional interpretation *in which there is a split amongst the Federal Circuits.*" Resp. C.A. Br. 33 (emphasis added). Now that the case is before this Court, however, respondent insists that the court below simply "followed the consensus view" and that "there is no contrary line of circuit authority." BIO 1–2. Respondent was right the first time.

1. The split between the court below and *Renda* v. *King*, 347 F.3d 550 (3d Cir. 2003), is far more than "arguabl[e]." BIO 12. Just like respondent, "Renda's statement was used in a criminal case in one sense (*i.e.*, to develop probable cause sufficient to charge her)," 347 F.3d at 559, but the charges were dismissed after pretrial proceedings and without a trial, see *id.* at 553. The *ratio decidendi* of *Renda* was likewise directly contrary to that of the Tenth Circuit in this case: "[I]t is the use of coerced statements during a criminal trial, *and not in obtaining an indictment*," *Renda* holds, "that violates the Constitution." *Id.* at 559 (emphasis added). That rule is now well–settled in the Third Circuit

and district courts have relied on it in dismissing claims materially identical to those of respondent.[1]

Respondent offers no plausible basis for distinguishing *Renda*. True, the main precedent on which *Renda* drew was a case about the scope of the qualified immunity defense rather the meaning of the Fifth Amendment. See BIO 13. But *Renda* wasn't. Instead, the question in *Renda*, as here, was whether the defendant's conduct "violate[d] the Constitution." *Renda*, 347 F.3d at 559.

Respondent also is correct (see BIO 13) that the type of the alleged Self–Incrimination Clause violation in this case is different from *Renda* because *Renda* involved a *Miranda* claim whereas this case involves an alleged violation of the rule of *Garrity* v. *New Jersey*, 385 U.S. 493 (1967). See Pet. 2 & n.1 (describing underlying claim). Respondent provides no explanation for why the *type* of allegedly coercive conduct would possibly bear on the *timing* question at issue here. And perhaps the best evidence for why the type of underlying Fifth Amendment claim doesn't matter is the fact that, in describing the decisions he characterizes as representing "the con-

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[1] See *Brooks* v. *Luther*, Civ. Act. No. 15–6707 (JBS–KMW), 2017 WL 626711, at *3 (D.N.J., Feb. 15, 2017) ("Plaintiff states the alleged coerced confession was used to secure an indictment and was referenced at his pretrial hearing. * * * He does not allege it was used against him at trial. Therefore, he has failed to state a claim, and the Court shall dismiss this claim without prejudice."); *Ojo* v. *Luong*, Civ. Act. No. 14–4347 (JLL), 2016 WL 1337274, at *5 (D.N.J., Apr. 5, 2016) (dismissing claim where plaintiff alleged "that his statements were used against him as part of pre–trial proceedings in his criminal case"); accord *Burno* v. *Kolich*, Civ. No. 07–4863 (FSH), 2008 WL 323614, at *4 (D.N.J., Feb. 4, 2008) (relying in *Renda* to dismiss claim where the plaintiff challenged use of allegedly compelled statements for purposes of "a pretrial ruling * * * denying a motion to suppress").

sensus view" (BIO 1), respondent moves seamlessly between decisions involving different types of Fifth Amendment claims. See BIO 8–10 (discussing, in turn, *Sornberger* v. *City of Knoxville*, 434 F.3d 1006, 1023 (7th Cir. 2006) (coerced confession claim and *Miranda* claim); *Best* v. *City of Portland*, 554 F.3d 698, 702 (7th Cir. 2009) (*Miranda* claim); *Higazy* v. *Templeton*, 505 F.3d 161, 170–171 (2d Cir. 2007) (coerced confession claim); *Stoot* v. *City of Everett*, 582 F.3d 910, 922 (9th Cir. 2009) (coerced confession claim), cert. denied, 559 U.S. 1057 (2010)).

2. Respondent's answer to all of the other decisions we have cited is to dismiss their statements as non–binding and unconsidered dicta. The courts below disagreed, of course. See Pet. App. 6a ("The Third, Fourth, and Fifth Circuits have stated that the Fifth Amendment is only a trial right."); *id.* at 42a ("The Fourth, Fifth, and Sixth Circuits also hold that the Fifth Amendment is not violated until a compelled statement is introduced at trial."). So does the next–most–recent decision that respondent presents as embodying "the consensus view." BIO 1; see *Stoot*, 582 F.3d at 924 (stating that "[t]he Third, Fourth, and Fifth Circuits have applied *Chavez* [v. *Martinez*, 538 U.S. 760 (2003)] to bar recovery under the Fifth Amendment unless the allegedly coerced statements were admitted against the defendant *at trial*"). So do district courts. See *Dowell* v. *Lincoln County*, 927 F. Supp.2d 741, 749 (E.D. Mo. 2013) (stating that "[t]hree circuits have held that statements must actually be used at trial" and citing decisions from the Third, Fourth, and Fifth Circuits); *Tinney* v. *Richland County*, No. 1:14 CV 703, 2015 WL 542415, at *4 (N.D. Ohio, Feb. 10, 2015) (stating that that "[t]he Third, Fourth, and Fifth Circuits appear to be in accord" that "when the government does not try to admit the confession

at a criminal trial, the Fifth Amendment plays no role") (citation omitted)). This split will not go away on its own and the lower courts are in need of this Court's guidance.

B. The Tenth Circuit's Decision Is Wrong

1. Respondent answers at length an argument we do not make while ignoring one we do make. Our argument does not turn on when a "criminal case" begins. U.S. Const. amend. V. Rather, it depends on what uses of allegedly compelled statements do—and what uses do not—render a someone "a witness against himself." *Ibid.* Our position is simple: "Mere compulsion" does not violate the Self–Incrimination Clause. *Chavez*, 538 U.S. at 773 (opinion of Thomas, J.). Until a criminal defendant is compelled to take the witness stand or the defendant's compelled out–of–court statements are presented to the jury, we submit, the defendant has not been made "to be a witness against himself" for purposes of that Clause.

2. Respondent's discussion of grand juries (see BIO 17–19) likewise misses the mark. It is common ground that "certain constitutional protections afforded defendants in criminal proceedings have no application before" a grand jury. *United States* v. *Williams*, 504 U.S. 36, 49 (1992). The question is why. Other that "just because," respondent offers no answer. But we do: Because the introduction of allegedly compelled statements before a grand jury does not render the declarant a person "a witness against himself" for purposes of the Fifth Amendment.

This point is confirmed, not undermined, by the fact that those "called upon to testify before the grand jury may invoke their Fifth Amendment

rights against self–incrimination, and may obtain use immunity encompassing their testimony." BIO 18–19. The reason a person called before a grand jury may invoke his own right to remain silent is the same as why that same person could do so in a police interrogation room or if called to testify in a civil case: the risk that those statements could *later* be used against him in a criminal trial. That, too, is why a grant of use immunity works: by eliminating any possibility that the compelled statements be used in the only setting where a Self–Incrimination Clause violation can occur, a criminal trial.

C. There Are No Vehicle Problems

The court of appeals' remand for further proceedings (BIO 19), the existence of other potential defenses (BIO 18–21), and the unremarkable fact that this case may raise other issues as well (BIO 22) provide no reason for denying certiorari on the single issue of law that is squarely presented here.

1. This case began with six defendants: two municipalities and four individual officers. See Pet. 3. After 27 months of litigation, the only remaining defendant is petitioner, a municipality whose population is just over 20,000 people. See Resp. C.A. App. 6 (giving filing date as May 14, 2015). Although petitioner, unlike its individual officers, has no ability to raise a qualified immunity defense, it has similar interests in not being subject to burdensome litigation for any longer than necessary.[2] This Court has not hesitated to grant municipalities' petitions for writs of certiorari in cases in this exact procedural posture: Section 1983 actions where a court of appeals reversed a district court's grant of a

[2] The district court has stayed proceedings pending the disposition of this petition for a writ of certiorari.

municipal defendant's motion to dismiss for failure to state a claim. See *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 754–755 (2005); *Inyo County* v. *Paiute–Shoshone Indians of the Bishop Comm. of the Bishop Colony*, 538 U.S. 701, 706–708 (2003); *Town of Newton* v. *Rumery*, 480 U.S. 386, 391 (1987); *Polk County* v. *Dodson*, 454 U.S. 312, 315–316 (1981); see also *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, 124–125 (2003) (court of appeals had reversed grant of motion to dismiss in favor of municipality in a False Claims Act action); *Board of County Com'rs* v. *Umbehr*, 518 U.S. 668, 672 (1996) (court of appeals had reversed grant of summary judgment in favor of municipality in Section 1983 case).

2. Unless promptly corrected, the court of appeals' erroneous decision will have adverse impacts far beyond one city in Kansas. Future panels of the Tenth Circuit and district courts throughout that circuit will be bound by the court of appeals' Fifth Amendment holding. And because that decision will itself create "clearly established law" within the Tenth Circuit, individual officers will be required to follow it on pain of losing the qualified immunity defense that shielded the individual defendants in this case. Pet. App. 21a–24a; see also Pet. 13–14 (explaining why the problem for officers "is only compounded by the fact that Self–Incrimination Clause analysis often depends on factors such as age, education, prior criminal experience, the manner of interrogation, and the existence of threats or inducement").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2017

No. 16–1495

In the Supreme Court of the United States

CITY OF HAYS, KANSAS, PETITIONER

v.

MATTHEW JACK DWIGHT VOGT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Fifth Amendment is violated when allegedly compelled statements are used at a probable cause hearing but not at a criminal trial.

PARTIES TO THE PROCEEDINGS

Petitioner, the City of Hays, Kansas, was a defendant–appellee in the court below.

Respondent Matthew Jack Dwight Vogt was the plaintiff–appellant in the court below.

The City of Haysville, Kansas, Don Scheibler, Jeff Whitfield, Kevin Sexton, and Brandon Wright are not parties in this Court but were defendants–appellees in the court below.

TABLE OF CONTENTS

Introduction 1
Opinions below 2
Jurisdiction 2
Constitutional provision involved 2
Statement 2
A. Factual background 2
B. Procedural background 4
Summary of argument 5
Argument 9
A. This Court has repeatedly described the Fifth Amendment as a trial right 9
B. Well–settled doctrines underscore that the Fifth Amendment is a trial right 15
C. This Court's "penalty cases" confirm that the Fifth Amendment is a trial right 23
D. A contrary rule would hinder efforts to detect and root out official misconduct 26
E. Other constitutional mechanisms exist for controlling abusive government conduct 30
Conclusion 32

TABLE OF AUTHORITIES

Cases:

Arizona v. *Fulminanate*, 499 U.S. 279 (1991) 27
Armour & Co. v. *Wantock*, 323 U.S. 126 (1944) 25
Arnett v. *Kennedy*, 416 U.S. 134 (1974) 30
Beck v. *Washington*, 369 U.S. 541 (1962) 20
Brown v. *Walker*, 161 U.S. 591 (1896) 1, 5, 16
Burns v. *Reed*, 500 U.S. 478 (1991) 29
Chavez v. *Martinez*, 538 U.S. 760 (2003) ..... passim
Counselman v. *Hitchcock*, 142 U.S. 547 (1892) 13
County of Riverside v. *McLaughlin*, 500 U.S. 44 (1991) 29
County of Sacramento v. *Lewis*, 523 U.S. 833 (1998) 32
Gardner v. *Broderick*, 392 U.S. 273 (1968) 23, 24
Garner v. *United States*, 424 U.S. 648 (1976) 14
Garrity v. *New Jersey*, 385 U.S. 493 (1967) ..... passim
Gerstein v. *Pugh*, 420 U.S. 103 (1975) 21, 22, 29
Graham v. *Connor*, 490 U.S. 386 (1989) 31
Hickman v. *Taylor*, 329 U.S. 495 (1947) 13
Hope v. *Pelzer*, 536 U.S. 730 (2002) 31
Hudson v. *Michigan*, 547 U.S. 586 (2006) 30
Hudson v. *United States*, 522 U.S. 93 (1997) 20
Hurtado v. *California*, 110 U.S. 516 (1884) 20
In re Gault, 387 U.S. 1 (1967) 13
Jackson v. *Denno*, 378 U.S. 368 (1964) 9, 27
Johnson v. *New Jersey*, 384 U.S. 719 (1966) 12

Kastigar v. *United States*, 406 U.S. 441 (1972) 9, 13, 16, 17
Kingsley v. *Hendrickson*, 135 S. Ct. 2466 (2015)..... 31
Lawn v. *United States*, 355 U.S. 339 (1958)..... 19
Lefkowitz v. *Cunningham*, 431 U.S. 801 (1977) 23, 24, 25
Lefkowitz v. *Turley*, 414 U.S. 70 (1973) ..... passim
Malloy v. *Hogan*, 378 U.S. 1 (1964) 1, 13
Martinez v. *City of Oxnard*, 337 F.3d 1091 (9th Cir. 2003) (per curiam) 31
Maryland v. *Craig*, 497 U.S. 836 (1990)..... 10
Maryland v. *Shatzer*, 559 U.S. 98 (2010)..... 29
Massiah v. *United States*, 377 U.S. 201 (1964) 10
McCarthy v. *Arndstein*, 266 U.S. 34 (1924)..... 13
McKune v. *Lile*, 536 U.S. 24 (2002)..... 17
Michigan v. *Tucker*, 417 U.S. 433 (1974)..... 14
Minnesota v. *Murphy*, 465 U.S. 420 (1984) 13, 14, 17
Miranda v. *Arizona*, 384 U.S. 436 (1966) 11, 13
Mitchell v. *United States*, 526 U.S. 314 (1999)..... 16
Murphy v. *Waterfront Comm'n*, 378 U.S. 52 (1964) 9, 18
New York v. *Quarles*, 467 U.S. 649 (1984)..... 12, 30
Oregon v. *Elstad*, 470 U.S. 298 (1985) 26
Owen v. *City of Independence*, 445 U.S. 622 (1980) . 26
Rochin v. *California*, 342 U.S. 165 (1952) 32
Slochower v. *Board of Higher Ed.*, 350 U.S. 551 (1956) 23, 24

Spevack v. *Klein*, 385 U.S. 511 (1967) 24
Stone v. *Powell*, 428 U.S. 465 (1976)..... 11
Stump v. *Sparkman*, 435 U.S. 349 (1978) 29
Uniformed Sanitation Men Ass'n v. *Commissioner of Sanitation*, 392 U.S. 280 (1968)..... 23, 24
United States v. *Calandra*, 414 U.S. 338 (1974) 19, 20
United States v. *Hubbell*, 530 U.S. 27 (2000) 1, 18
United States v. *Janis*, 428 U.S. 433 (1976)..... 11, 20
United States v. *Kordel*, 397 U.S. 1 (1970) 14
United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) ..... passim
United States v. *Washington*, 431 U.S. 181 (1977)... 13
United States v. *Williams*, 504 U.S. 36 (1992) ... 19, 22
Watkins v. *United States*, 354 U.S. 178 (1957)..... 13
Whitley v. *Alberts*, 475 U.S. 312 (1986)..... 31
Withrow v. *Williams*, 507 U.S. 680 (1993)..... 9, 11, 12

Constitutional Provisions:

U.S. Const. amend. IV 31
U.S. Const. amend. V..... passim
U.S. Const. amend. VI 22
U.S. Const. amend. VIII 31

Statutes and Rules:

18 U.S.C. § 6002..... 16
28 U.S.C. § 1254(1) 2
42 U.S.C. § 1983..... 4
Fed. R. Crim. P. 12(d) 27

Kan. Stat. Ann. § 22–2902(1) (2016) 3, 21, 26
Kan. Stat. Ann. § 22–2902(3) (2016) 21
Kan. Stat. Ann. § 22–3215(1) (2016) 28
Kan. Stat. Ann. § 22–3215(3) & (5) (2016) 28

Miscellaneous:

3 Wayne R. LaFave et al., *Criminal Procedure* § 10.1(a) (4th ed. 2016) 27
Jeffrey Toobin, *The Run of His Life: The People v. O.J. Simpson* (2015) 15

INTRODUCTION

The Fifth Amendment to the United States Constitution provides that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; see *Malloy* v. *Hogan*, 378 U.S. 1, 6 (1964) (holding this Clause is incorporated against the States). Although this provision is commonly known as the Self–Incrimination Clause, this Court has explained that "[t]he term 'privilege against self–incrimination' is not an entirely accurate description of" what the Clause actually prohibits. *United States* v. *Hubbell*, 530 U.S. 27, 34 (2000). The Fifth Amendment provides no protection against embarrassment, "personal disgrace or opprobrium." *Brown* v. *Walker*, 161 U.S. 591, 605 (1896), nor does it prohibit compulsion as such. At its heart, the Self–Incrimination Clause creates an evidentiary rule that bars the prosecution from forcing a criminal defendant to take the witness stand or from introducing the defendant's own previously compelled statements at trial. To ensure that rule is not violated, this Court has held that those at risk of future prosecution or penalties have a legally enforceable privilege against being compelled to make statements that could be used to incriminate them in such proceedings. But, at bottom, the Fifth Amendment is "a fundamental *trial* right of criminal defendants" that can be violated "only *at trial*." *United States* v. *Verdugo–Urquidez*, 494 U.S. 259, 264 (1990) (emphasis added). Because here the allegedly compelled statements were never used against respondent "at trial," he has stated no claim upon which relief can be granted and this Court should reverse.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–34a) is reported at 844 F.3d 1235. The district court's Memorandum and Order (Pet. App. 35a–44a) is unpublished but is available at 2015 WL 5730331.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 2017. A petition for rehearing was denied on January 30, 2017 (Pet. App. 45a). On April 21, 2017, Justice Sotomayor extended the time to file a petition for a writ of certiorari to and including June 29, 2017. The petition for a writ of certiorari was filed on June 13, 2017, and granted on September 28, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person * * * shall be compelled in any criminal case to be a witness against himself."

STATEMENT

A. Factual background

Petitioner City of Hays (City) is a municipality in Kansas; respondent Matthew Vogt is one of its former police officers. Pet. App. 47a. In 2013, while still employed by the City, Vogt applied for a job with the police department of a different municipality. *Id.* at 48a. During an interview, Vogt revealed that, "while working as a * * * police officer" for the City, he had "com[e] into possession of" a knife, but, rather than reporting the knife, "he had kept [it] for his personal use." *Ibid.* The interviewing department extended a job offer, conditioned on Vogt telling the City (his then–current employer) about the knife and surrendering it. *Id.* at 48a–49a.

Vogt told the City's chief of police about the knife. Pet. App. 49a. The chief directed Vogt to provide additional information and opened an internal investigation. *Ibid.* In the language of his own complaint, Vogt then gave the chief a "vague one–sentence report related to his possession of the knife" and submitted his two weeks' notice of resignation. *Ibid.*[1] The lieutenant in charge of internal investigations directed Vogt to provide additional information. *Ibid.* Vogt made a further statement, which included "the type of police call [Vogt] was handling when he came into possession of the knife." *Id.* at 49a–50a. Using that information, the lieutenant was able to locate "an audio recording which captured the circumstances of how [Vogt] came into possession of the knife." *Id.* at 50a. At that point, the chief suspended the internal investigation and gave Vogt's statements and the resulting information to the Kansas Bureau of Investigation. *Ibid.* Because Vogt had become the subject of a criminal investigation, the other municipality withdrew its job offer. *Ibid.*

The State of Kansas (which is not a party to this case) later charged Vogt with two felony counts related to the knife. Pet. App. 50a. Under state law, Vogt was entitled to what his complaint refers to as a "probable cause hearing," *ibid.*, and what Kansas statutes call "a preliminary examination." Kan. Stat. Ann. § 22–2902(1) (2016). Vogt alleges that, at this hearing, his

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[1] According to Vogt, this statement and subsequent statements to his lieutenant were "compelled" because providing them was "a condition of his employment with the Hays police department." Pet. App. 49a; see *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967) (holding that "statements obtained under threat of removal from office" are compelled for purposes of the Self–Incrimination Clause).

statements about the knife and information from the subsequent investigation were "used against him." Pet. App. 50a.[2] After the hearing, a state trial court judge dismissed both charges for lack of probable cause. *Id.* at 50a–51a.

B. Procedural background

1. Following the dismissal of all criminal charges against him, Vogt sued the City, the other municipality with which he had sought employment, and four individual officers. Pet. App. 46a–54a. Vogt alleged that the defendants were liable under 42 U.S.C. § 1983 for violating his Fifth Amendment rights. *Id.* at 51a–53a. As relevant here, Vogt alleged that: (1) by threatening to terminate his employment if he did not provide additional statements about the knife, the defendants compelled him to make incriminating statements; and (2) his Fifth Amendment rights were violated when those statements were used at the probable cause hearing. *Id.* at 49a–50a.

All of the defendants (including the City) moved to dismiss Vogt's complaint for failure to state a claim. Pet. App. 35a. The district court granted that motion, reasoning that because "the compelled statements were never introduced against Vogt at trial," the complaint "fail[ed] to state a violation of his Fifth Amendment rights." *Id.* at 43a–44a.

2. The Tenth Circuit affirmed in part and reversed in part. Pet. App. 1a–34a. The court affirmed the dis-

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[2] The complaint does not specify the manner in which the statements or resulting information "were used against" Vogt or whether Vogt objected to that use. Pet. App. 50a. Vogt's complaint is reproduced, in its entirety, at Pet. App. 46a–54a.

missal of Vogt's claims against the four individual officers based on qualified immunity. *Id.* at 2a. The court also affirmed the dismissal of Vogt's claim against the other municipality because it had not compelled Vogt to incriminate himself. *Ibid.* Unlike the district court, however, the Tenth Circuit concluded that Vogt had stated a valid Fifth Amendment claim against the City, the municipality that had employed him. *Ibid.*

The key question in this case, the Tenth Circuit recognized, is whether using a compelled statement at a probable cause hearing violates the Self–Incrimination Clause. The court of appeals determined it does. The Tenth Circuit acknowledged that this Court has "suggested * * * that the right against self–incrimination is only a trial right." Pet. App. 5a (citing *United States* v. *Verdugo–Urquidez*, 494 U.S. 259, 264 (1990)). Ultimately, however, the court of appeals concluded that: (1) "the right against self–incrimination is more than a trial right," *id.* at 10a; and (2) "[t]he Fifth Amendment is violated when criminal defendants are compelled to incriminate themselves and the incriminating statement is used in a probable cause hearing." *Id.* at 2a.

SUMMARY OF ARGUMENT

The Fifth Amendment provides that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." To be clear: Our argument does not turn on when a "criminal case" begins. Instead, it involves a different question: What acts render someone "a witness against himself" within that criminal case?

Our position is simple: The Self–Incrimination Clause provides no protection against embarrassment, "personal disgrace or opprobrium." *Brown* v. *Walker*,

161 U.S. 591, 605 (1896), and compulsion alone does not violate it. Unless and until a criminal defendant is forced to take the witness stand or the defendant's own compelled statements are introduced against the defendant at trial, we submit, the defendant has not been made "to be a witness against himself," and no Fifth Amendment violation has occurred.

A. On multiple occasions, this Court and individual Justices have described the Self–Incrimination Clause as "a fundamental trial right of criminal defendants" that can be violated "only at trial." *United States* v. *Verdugo–Urquidez*, 494 U.S. 259, 264 (1990). To be sure, none of these statements was a holding on the specific issue now before the Court. But nor can they be dismissed as casual dicta. Rather, in several instances, the fact that the Fifth Amendment protects a specifically trial–focused right was fundamental to the analysis of the questions then in dispute.

The privilege against self–incrimination may, of course, be claimed outside and long before the start of any criminal case. But that fact does not change the Fifth Amendment's basic character, because the question of when the privilege may be claimed is distinct from the question of when a Self–Incrimination Clause violation actually occurs. And, as this Court has explained, the ability to claim the privilege before trial serves two important functions: preventing end–runs around the principle that criminal defendants may not be compelled to be witnesses at their own trials and heading off any claim that earlier statements were voluntary, and thus admissible at those trials.

B. Firmly established doctrines confirm that the Fifth Amendment is a trial right. Most notably, the

privilege not to speak terminates once the threat of future criminal liability is removed, including via a grant of immunity. Nor can the court of appeals' view that "the Fifth Amendment precludes use of compelled statements in pretrial proceedings," Pet. App. 19a, be squared with the fact that a criminal defendant cannot attack a facially valid indictment by alleging that the grand jury considered the defendant's own previously compelled statements. It also would make little sense to apply different constitutional rules to pretrial proceedings (like the probable cause hearing at issue here) that are expressly designed to serve as substitutes for grand juries than to grand juries themselves. Last but not least, this Court's decisions confirm that other constitutional provisions that use the word "witness"—most notably, the Confrontation Clause of the Sixth Amendment—also protect trial rights.

C. This Court's "penalty cases" underscore that the Self–Incrimination Clause is a trial right. The Court has identified various contexts where the government may not condition public employment or other benefits on a person's waiver of the privilege against self–incrimination. In all but one of those cases, however, no statements were made, so the Court had no occasion to decide what restrictions the Fifth Amendment would have placed on their use. And in the one case where the subjects made statements (*Garrity* v. *New Jersey*, 335 U.S. 493 (1967)), the only constitutional violation identified by the Court was the use of those statements at the defendants' criminal trial. Finally, even if *some* types of Fifth Amendment violations could occur before trial, the Court should reject any such notion for *Garrity* claims. Instead, the Court should hold that, when a public employee speaks, no constitutional violation occurs unless and until the resulting statements

or their fruits are used against that employee at a subsequent criminal trial.

D. The court of appeals' contrary rule would hinder efforts to detect and root out misconduct by public officials. From the City's perspective, this matter began when one of its police officers volunteered information that suggested misconduct and required investigation. The court of appeals' holding— that Vogt has stated a claim against the City even though the allegedly compelled statements were never used against him at a criminal trial—would require States to further re–jigger already complicated pre–trial procedures, delay what are meant to be informal preliminary proceedings, and chill investigations into official misconduct.

E. Holding that the Self–Incrimination Clause can only be violated at trial would not require the Court to overlook or condone bad behavior because other constitutional provisions place substantial restrictions on abusive government conduct. This Court has already ruled that sufficiently serious interrogation–related misconduct violates the Due Process Clause, and that it does so regardless of whether a criminal case is even initiated. The Fourth, Eighth, and Fourteenth Amendments also provide protection against excessive or unwarranted force from the moment of initial contact with law enforcement through ultimate release from confinement.

ARGUMENT

This case presents a straightforward question of law: Is the Fifth Amendment violated when allegedly compelled statements are used at a probable cause hearing but never at a criminal trial? The answer is no.

To be clear at the outset: Our argument does not turn on when a "criminal case" begins. U.S. Const. amend. V. Rather, it involves what uses of allegedly compelled statements do—and what uses do not—render someone "a witness against himself" within that criminal case. Precedent, purpose, and policy all point to the same answer: A person has not been "compelled * * * to be a witness against himself," U.S. Const. amend. V, unless and until a criminal defendant is forced to take the witness stand or the defendant's own compelled statements are introduced against the defendant at a criminal trial.

A. This Court has repeatedly described the Fifth Amendment as a trial right

1. This Court and individual Justices have repeatedly described "[t]he privilege against self–incrimination guaranteed by the Fifth Amendment" as "a fundamental trial right" that can be violated "only at trial." *United States* v. *Verdugo–Urquidez*, 494 U.S. 259, 264 (1990).[3] None of these statements, of course, was a

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[3] Accord *Withrow* v. *Williams*, 507 U.S. 680, 691 (1993) (stating that "*Miranda* safeguards a fundamental *trial* right") (internal quotation marks and citation omitted); *Kastigar* v. *United States*, 406 U.S. 441, 461 (1972) (stating that "[a] coerced confession * * * is inadmissible *in a criminal trial*") (emphasis added); *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 57 n.6 (1964) (describing the Fifth Amendment as forbidding "the use *in a criminal trial* of self–incriminating statements elicited by compulsion") (emphasis added); see also *Jackson* v. *Denno*, 378 U.S. 368, 377

holding on the precise question now before the Court. But nor were they casual dicta. Instead, these descriptions of how the Fifth Amendment operates played an important role in the analysis of the issues then in dispute.

Take *Verdugo–Urquidez*, for example. The issue there involved the scope of the Fourth Amendment, specifically whether it "applie[d] to the search and seizure by United States agents of property * * * owned by a nonresident alien and located in a foreign country." 494 U.S. at 261. The relevant discussion is in the first paragraph of the Court's legal analysis, which began by emphasizing the importance of distinguishing between the Fourth and Fifth Amendments. *Id.* at 264. "Although conduct by law enforcement officers prior to trial may ultimately impair that right," the Court explained, "[t]he privilege against self–incrimination * * * is a fundamental trial right" and "a constitutional violation occurs only at trial." *Ibid.* In contrast, "[t]he Fourth Amendment functions differently" by "prohibit[ing] 'unreasonable searches and seizures' whether or not the evidence is sought to be used in a criminal trial." *Ibid.* And because a Fourth Amendment violation "is fully accomplished at the time of an

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(1964) (referring to a defendant's due process–based "right to be free of a *conviction* based upon a coerced confession") (emphasis added); *Maryland* v. *Craig*, 497 U.S. 836, 865 (1990) (Scalia, J., dissenting) (arguing that the phrase "witnesses *against him*" in the Confrontation Clause "obviously refers to those who give testimony against the defendant at trial"); *Massiah* v. *United States*, 377 U.S. 201, 206 (1964) (holding that the defendant "was denied the basic protections of" the Sixth Amendment "guarantee when *there was used against him at his trial* evidence of his own incriminating words," which were deliberately elicited after indictment and when counsel was not present) (emphasis added).

unreasonable government intrusion," the Court continued, any constitutional violation in *Verdugo–Urquidez* occurred "solely" in the place the search was performed (Mexico). *Ibid.* (internal quotation marks and citation omitted). The differing natures of the Fourth and Fifth Amendments was thus critical to the Court's analysis of the issue before it. Accord *United States* v. *Janis*, 428 U.S. 433, 443 (1976) (contrasting "the Fifth Amendment's direct command against the admission of compelled testimony" with the fact that, under the Fourth Amendment, "the issue of admissibility of evidence * * * is determined after, and apart from, the violation").

The difference between the Fourth and Fifth Amendments also was critical in *Withrow* v. *Williams*, 507 U.S. 680 (1993). In *Stone* v. *Powell*, 428 U.S. 465 (1976), this Court held that federal habeas review is generally unavailable to state prisoners who claim that a conviction rests on evidence obtained in violation of the Fourth Amendment. *Id.* at 494–495. The question in *Withrow* was whether that same rule applies to claims that a conviction stems from a violation of the Fifth Amendment rule recognized in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The Court said no, and, once again, its explanation relied on the differences between the Fourth and Fifth Amendments. A criminal defendant, the Court explained, has no "'personal constitutional right'" to the exclusion of evidence obtained in violation of the Fourth Amendment because "the exclusion of evidence at trial can do nothing to remedy the completed and wholly extrajudicial Fourth Amendment violation." *Withrow*, 507 U.S. at 691 (quoting *Stone*, 428 U.S. at 486). But the Fifth Amendment is different. "'Prophylactic' though it may be," the Court

explained, "in protecting a defendant's Fifth Amendment privilege against self–incrimination, *Miranda* safeguards 'a fundamental *trial* right.'" *Ibid.* (quoting *Verdugo–Urquidez*, 494 U.S. at 264). And on the very next page, the Court made clear what "fundamental *trial* right" it was talking about: "guard[ing] against 'the use of unreliable statements *at trial*.'" *Id.* at 692 (quoting *Johnson* v. *New Jersey*, 384 U.S. 719, 730 (1966)) (emphasis added).

The same is true of Justice Marshall's analysis in *New York* v. *Quarles*, 467 U.S. 649 (1984). Dissenting from the Court's decision to recognize a "public–safety exception" to *Miranda*, Justice Marshall questioned the need for any such doctrine. "If a bomb is about to explode or the public is otherwise imminently imperiled," Justice Marshall explained, "the police are free to interrogate suspects without advising them of their constitutional rights. * * * If trickery is necessary to protect the public, then the police may trick a suspect into confessing." *Id.* at 686 (Marshall, J., dissenting). The reason Justice Marshall gave is simple and directly applicable to this case: "While the Fourteenth Amendment sets limits on such behavior, nothing in the Fifth Amendment * * * proscribes this sort of emergency questioning. *All the Fifth Amendment forbids is the introduction of coerced statements at trial.*" *Ibid.* (emphasis added). We agree.

2. This Court has long recognized that those subject to future prosecution have a legally enforceable privilege to refuse to make statements that may tend to incriminate them in that future prosecution. *Lefkowitz* v. *Turley*, 414 U.S. 70, 77 (1973) (explaining that the Fifth Amendment creates a "privilege[] * * * not to answer official questions * * * in any * * * proceeding,

civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings"); see *Minnesota* v. *Murphy*, 465 U.S. 420, 426 (1984) (similar). That is why people may "take the Fifth" in civil cases,[4] before congressional committees,[5] in juvenile proceedings,[6] inside a police interrogation room,[7] and before a grand jury.[8] And it is why, when they do so, "the interrogation must cease," *Miranda*, 384 U.S. at 474, and the person may not be jailed or otherwise compelled to testify.[9]

But the question is not whether these rules exist: the question is why. And the reason is not because compelling someone to speak in any of those situations—situations that often will occur long before it is clear whether there even will *be* a "criminal case[]" at all—would, in and of itself, violate the Fifth Amendment. Rather, "[t]he natural concern which underlies many of these decisions is that an inability to protect the right at one stage of a proceeding may make its

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[4] *Malloy* v. *Hogan*, 378 U.S. 1, 11 (1964); accord *McCarthy* v. *Arndstein*, 266 U.S. 34, 40–41 (1924) (bankruptcy proceedings).

[5] *Watkins* v. *United States*, 354 U.S. 178, 188, 195–197 (1957).

[6] *In re Gault*, 387 U.S. 1, 49–50, 55 (1967).

[7] *Miranda* v. *Arizona*, 384 U.S. 436, 444–445 (1966).

[8] *United States* v. *Washington*, 431 U.S. 181, 186 (1977); *Counselman* v. *Hitchcock*, 142 U.S. 547, 562 (1892), overruled in part by *Kastigar* v. *United States*, 406 U.S. 441 (1972).

[9] If a judge or other governmental actor improperly fails to respect the privilege not to incriminate oneself, that decision may be challenged by resisting any enforcement action on the ground that it was taken without lawful authority. Cf. *Hickman* v. *Taylor*, 329 U.S. 495, 500, 514 (1947) (affirming vacatur of contempt citation against attorney for refusing to turn over notes of interviews w..h witnesses after concluding that the discovery rules did not obligate the attorney to turn over the notes).

invocation useless at a later stage." *Michigan* v. *Tucker*, 417 U.S. 433, 440–441 (1974).

Allowing a prospective criminal defendant to claim a privilege against self–incrimination addresses this concern in two related but distinct ways. The first involves preventing end–runs. As this Court has explained, "a defendant's right not to be compelled to testify against himself *at his own trial* might be practically nullified if" the prosecution could simply introduce self–incriminating statements that the defendant had been forced to make beforehand. *Tucker*, 417 U.S at 441 (emphasis added).

The second reason involves avoiding later disputes about whether pretrial statements were actually compelled. In *Minnesota* v. *Murphy*, 465 U.S. 420 (1984), for example, the Court held that a criminal defendant had forfeited any ability "to prevent the information he volunteered to his probation officer from being used against him in a criminal prosecution." *Id.* at 440. Because "Murphy revealed incriminating information instead of timely asserting his Fifth Amendment privilege," the Court reasoned, "his disclosures were not compelled incriminations" and the Fifth Amendment posed no barrier to their admission at a subsequent trial. *Ibid.*; see also *Garner* v. *United States*, 424 U.S. 648, 665 (1976) (similar holding about statements on tax returns); *United States* v. *Kordel*, 397 U.S. 1, 7 (1970) (same with respect to answers to interrogatories during an earlier civil proceeding). Allowing an assertion of privilege during earlier proceedings is thus necessary to remove any claim that the party "forfeit[ed] the right to exclude the evidence in a subsequent 'criminal case.'" *Chavez* v. *Martinez*, 538 U.S. 760, 771 (2003) (opinion of Thomas, J.). In both senses, though, the reason for these rules is to ensure that any

resulting statements may not be used in the only setting where the Fifth Amendment can actually be violated: a criminal trial in which the declarant is the defendant.

B. Well–settled doctrines underscore that the Fifth Amendment is a trial right

Three other doctrinal features confirm that the Self–Incrimination Clause is a "trial right" (*Verdugo–Urquidez*, 494 U.S. at 264) rather than a freestanding entitlement against having compelled statements used in connection with judicial proceedings. The first is the well–settled principle that there is no right to remain silent when there is no risk of future criminal liability. The second is the fact that even those still facing liability may not attack a facially valid indictment on the theory that the grand jury considered the defendant's own compelled statements. The third is that two other constitutional provisions that use the word "witness"—the Confrontation and the Compulsory Process Clauses—also protect trial rights.

1. It is black–letter law that there is no privilege absent danger of future criminal liability. Most dramatically, because the Double Jeopardy Clause would bar another prosecution, a person who has been acquitted of a crime loses the privilege not to speak about it. (That is why, for example, O.J. Simpson could not claim any privilege against self–incrimination at the civil trial following his acquittal on murder charges. See Jeffrey Toobin, *The Run of His Life: The People v. O.J. Simpson* 427–428 (2015).) But the same is true regardless of why future criminal liability is off the table. Whether the statute of limitations has run, the underlying criminal statute has been repealed, or the person has been pardoned, the answer is the same.

The Self-Incrimination Clause provides no protection against embarrassment, "personal disgrace or opprobrium." *Brown* v. *Walker*, 161 U.S. 591, 605 (1896). "If no adverse consequences can be visited * * * by reason of further testimony, then there is no further incrimination to be feared" and no privilege to be invoked. *Mitchell* v. *United States*, 526 U.S. 314, 326 (1999).[10]

Indeed, the Fifth Amendment provides no absolute shield even to those still facing the prospect of criminal liability. In *Kastigar* v. *United States*, 406 U.S. 441 (1972), for example, this Court affirmed an order requiring unwilling witnesses to testify before a grand jury. *Id.* at 442–443, 462. Because the witnesses had not received "transactional immunity"—that is, "immunity from prosecution for offenses to which compelled testimony relates"—they still could have been convicted and punished for the underlying conduct. *Id.* at 443. The Court nonetheless rejected the witness's claim of privilege. The witnesses had been granted "use and derivative-use immunity," *id.* at 458, pursuant to a statute providing that neither their testimony

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[10] In *Mitchell*, this Court held that a criminal defendant who pleads guilty but has not yet been sentenced may continue to assert a privilege against self-incrimination at the sentencing hearing. 526 U.S. at 321. Far from endorsing the view that *any* use of allegedly compelled statements in connection with a criminal case violates the Self-Incrimination Clause, *Mitchell* emphasized that a convicted but unsentenced defendant can still face direct "adverse consequences" from any statements until "the sentence has been fixed and the judgment of conviction has become final." *Id.* at 326; see *id.* at 325 ("reject[ing] the proposition that incrimination is complete once guilt has been adjudicated") (internal quotation marks and citation omitted). Our position is simply the converse: a person cannot be made to be a "[w]itness against himself" *until* a case reaches the stage where guilt and punishment are determined.

nor "any information directly or indirectly derived from such testimony * * * may be used against the witness in any criminal case." *Id.* at 460 (quoting 18 U.S.C. § 6002). Because this pledge "removed the dangers against which the privilege protects," *id.* at 449, and left "the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege," *id.* at 458–459 (quotation marks and citation omitted), the Court held that it was "constitutionally sufficient to compel testimony over a claim of the privilege." *Id.* at 458; accord *McKune* v. *Lile*, 536 U.S. 24, 35 (2002) (opinion of Kennedy, J.) (explaining that "[i]f the State of Kansas offered immunity, the self–incrimination privilege would not be implicated"); *Minnesota* v. *Murphy*, 465 U.S. at 435–436 n.7 (noting that a State may compel probationers to provide "answers to even incriminating questions * * * as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination").

To be sure, *Kastigar* contains language that could be read to say that the statutory grant of immunity would have direct application to various out–of–court activities as well. See, *e.g.*, 406 U.S. at 459 (referencing use of immunized testimony to "obtain leads, names of witnesses, or other information not otherwise available"). But these statements must be read in context. Even in *Kastigar* itself, the Court made clear that the fundamental purpose of immunity is "assuring that the compelled testimony can in no way lead to the infliction of criminal *penalties*"; that "[b]oth the [immunity] statute and the Fifth Amendment allow the government to *prosecute* using evidence from legitimate independent sources"; and that the proper forum for

resolving such disputes is "*at trial*." *Id.* at 461 (emphasis added); accord *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 57 n.6 (1964) (describing the Fifth Amendment as forbidding "the use *in a criminal trial* of self–incriminating statements elicited by compulsion") (emphasis added).[11]

What is more, the argument that a Fifth Amendment violation can occur absent *any* courtroom use of the resulting statements—whether based on *Kastigar* or language in earlier cases—is foreclosed by this Court's later decision in *Chavez* v. *Martinez*, 538 U.S. 760 (2003). In *Chavez*, the Ninth Circuit held that an officer's "coercive questioning" of the plaintiff, in and of itself, "violated his Fifth Amendment rights." *Id.* at 765 (opinion of Thomas, J.). This Court reversed. Although there was no opinion for the Court on the Fifth Amendment issue, even the dissenting Justices recognized that a majority had "conclude[d] that a violation of the Self–Incrimination Clause does not arise until a

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[11] The same is true of *United States* v. *Hubbell*, 530 U.S. 27 (2000), which affirmed the dismissal of an indictment against a defendant previously granted immunity in connection with a subpoena *duces tecum*. See *id.* at 30–32, 34. The bulk of the Court's analysis focused on the threshold question of whether, absent the grant of immunity, the act of producing the documents would have been covered by the Fifth Amendment. Having answered that question yes, see *id.* at 45, the Court turned to the question of remedy. Summarizing *Kastigar*, the Court stated that the indictment must be dismissed "unless the Government prove[d] that the evidence it used in obtaining the indictment *and proposed to use at trial* was derived from legitimate sources 'wholly independent' of the testimonial aspect of respondent's immunized conduct." *Ibid.* (emphasis added). Like *Kastigar*, then, *Hubbell* had no occasion to determine whether the Fifth Amendment is actually *violated* by uses short of trial.

privileged statement is introduced at some later criminal proceeding." *Id.* at 789 (Kennedy, J., concurring in part and dissenting in part); accord *id.* at 767 (opinion of Thomas, J.) ("Martinez was never made to be a 'witness' against himself * * * because his statements were never admitted as testimony against him in a criminal case"); *id.* at 777 (Souter, J., concurring in the judgment) (stating that the Self–Incrimination Clause "focuses on courtroom use of a criminal defendant's compelled, self–incriminating testimony" and that "the core of the guarantee against compelled self–incrimination is the exclusion of any such evidence"). Indeed—and directly relevant to this case—Justice Kennedy's dissenting opinion described the controlling opinions as "maintain[ing] that in all instances a violation of the Self–Incrimination Clause simply does not occur unless and until a statement is introduced *at trial*." *Id.* at 790 (Kennedy, J., concurring in part and dissenting in part) (emphasis added).

2. a. The Tenth Circuit's conclusion that "the Fifth Amendment precludes use of compelled statements in pretrial proceedings," Pet. App. 19a, has another serious problem as well: It cannot be squared with the rule that a criminal defendant may not attack a facially valid indictment by alleging that the grand jury considered his own previously compelled statements. See *United States* v. *Calandra*, 414 U.S. 338, 346 (1974) ("[A]n indictment based on evidence obtained in violation of a defendant's Fifth Amendment privilege is nevertheless valid."); accord *Lawn* v. *United States*, 355 U.S. 339, 349–350 (1958).

The grand jury is, of course, "a constitutional fixture in its own right," *United States* v. *Williams*, 504 U.S. 36, 47 (1992) (quotation marks and citation omit-

ted). But the Fifth Amendment contains a "direct command against the admission of compelled testimony," *Janis*, 428 U.S. at 443, and neither the Fifth nor the Sixth Amendment carves out a grand jury–specific exception to that command. This Court's decisions, however, provide an answer that both explains the grand jury example and covers this case: "The privilege against self–incrimination * * * is a fundamental trial right" that can be violated "only at trial." *Verdugo–Urquidez*, 494 U.S. at 264. See p. 12–15, *supra* (explaining that witnesses who are potentially subject to criminal liability may invoke a right to remain silent before the grand jury itself).[12]

b. The grand jury comparison does not merely refute any suggestion that a Fifth Amendment violation can occur during any "pretrial proceedings." Br. in. Opp. 15. It also underscores why saying that a violation can occur at the specific type of hearing at issue in this case would make little sense.

The Grand Jury Clause is one of the few provisions of the Bill of Rights that is not incorporated against the States via the Fourteenth Amendment. See *Hurtado* v. *California*, 110 U.S. 516, 521 (1884); accord *Beck* v. *Washington*, 369 U.S. 541, 545 (1962) ("[T]here is no federal constitutional impediment to dispensing

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[12] Vogt's proposed analogies to other rules of constitutional criminal procedure, see Br. in Opp. 17–18, miss the mark. A defendant *may* attack a facially valid indictment by claiming that the prosecution violates the Double Jeopardy Clause. See, *e.g.*, *Hudson* v. *United States*, 522 U.S. 93, 99 (1997). And the reason a grand jury need not apply the Fourth Amendment exclusionary rule is because a violation of that Amendment "is fully accomplished by the original search" and the consideration of such evidence by a grand jury "work[s] no new Fourth Amendment wrong." *Calandra*, 414 U.S. at 354.

entirely with the grand jury in state prosecutions."). Instead, the Federal Constitution permits States to substitute prosecution by way of information, with no "judicial oversight or review of the decision to prosecute" or ability to challenge the information as not being supported by probable cause. *Gerstein* v. *Pugh*, 420 U.S. 103, 119 (1975).

By providing Vogt with "a right to a preliminary examination before a magistrate" to determine whether "it appears that a felony has been committed and there is probable cause to believe that a felony has been committed by the defendant," Kan. Stat. Ann. §§ 22–2902(1), (3) (2016), the State of Kansas has gone beyond what the Federal Constitution requires. See *Gerstein*, 420 U.S. at 119 (stating that "a judicial hearing is not [a] prerequisite to prosecution by information"). What is more, the State has created a procedure that is expressly designed to serve as an alternative to the very grand jury proceedings during which the Federal Constitution would pose no bar to consideration of any allegedly compelled statements. See Kan. Stat. Ann. § 22–2902(1) (2016) (providing that a right to a preliminary examination exists "*unless* such charge has been issued as a result of an indictment by a grand jury") (emphasis added). It would make little sense to say that the Fifth Amendment is violated under such circumstances.

3. Related constitutional provisions further underscore that the Fifth Amendment right not to be "compelled in any criminal case to be a witness against" oneself is a trial right. The Sixth Amendment contains two uses of the word "witness," providing that, "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against

him [and] to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI.

As with the Self–Incrimination Clause, this Court's decisions confirm that the Confrontation and Compulsory Process Clauses protect trial–specific rights. In *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), this Court held that state court defendants who have not been indicted by a grand jury have a constitutional right to a probable cause hearing before they may be detained pending trial. *Id.* at 126. In so doing, however, the Court specifically rejected the argument that such hearings "must be accompanied by the full panoply of adversary safeguards—counsel, *confrontation*, cross-examination, and *compulsory process* for witnesses." *Id.* at 119 (emphasis added); see *id.* at 120 ("These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment."). So too in the grand jury context, where the Court has made clear that, notwithstanding the Confrontation and Compulsory Process Clauses, there is no right to confront the people who testify or to present one's own evidence. See *Williams*, 504 U.S. at 52 (stating that a target of a grand jury inquiry has no right "to tender his own defense"). The same word ("witness") in the Fifth Amendment should be construed likewise.[13]

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[13] The fact that the Self–Incrimination Clause is housed in the Fifth Amendment rather than the Sixth, see Pet. App. 17a–19a, provides no warrant for construing the word "witness" differently in those provisions. For one thing, as the court of appeals noted, see *id.* at 15a, James Madison's original draft of the Self–Incrimination Clause appears to have covered incrimination in both civil and criminal proceedings, which may explain why he avoided placing it in a provision (the Sixth Amendment) whose first words are: "In all criminal prosecutions * * *." It also is noteworthy that all of the rights protected by the Fifth Amendment,

C. This Court's "penalty cases" confirm that the Fifth Amendment is a trial right

Although there is only one Fifth Amendment, there are different kinds of self–incrimination claims. Vogt's claim arises under this Court's "penalty cases," specifically the rule of *Garrity* v. *New Jersey*, 385 U.S. 493 (1967). See Pet. App. 4a. These cases confirm that "[t]he privilege against self–incrimination," both in general and in the specific *Garrity* context, "is a fundamental trial right" that can be violated "only at trial." *Verdugo–Urquidez*, 494 U.S. at 264.

1. The Court has identified various contexts where the "government cannot penalize assertion of the constitutional privilege against compelled self–incrimination by imposing sanctions to compel testimony which has not been immunized." *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 806 (1977). Those sanctions include state–mandated removal as an officer in a political party, *id.* at 802, 804; cancellation of public contracts, *Turley*, 414 U.S. at 71, 76; disbarment of an attorney, *Spevack* v. *Klein*, 385 U.S. 511, 512–513 (1967); and loss of public employment, *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation*, 392 U.S. 280, 281–283 (1968); *Gardner* v. *Broderick*, 392 U.S. 273, 274–275, 279 (1968); *Garrity*, 385 U.S. at 500; see also *Slochower* v. *Board of Higher Ed.*, 350 U.S. 551 (1956) (similar holding under the Due Process Clause). "In any of these contexts," the Court has stated, "a witness

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including the Self–Incrimination Clause, are phrased in the negative, whereas all of the rights in the Sixth Amendment are phrased in the positive. Compare U.S. Const. amend. V ("No person shall * * *; nor shall any person * * *; nor shall be * * *, nor be * * *; nor shall * * *), with U.S. Const. amend. VI ("the accused shall enjoy the right to * * *").

protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant." *Turley*, 414 U.S. at 78.

2. In all but one of the penalty cases, however, the prospective defendants made no statements. See *Cunningham*, 431 U.S. at 803; *Turley*, 414 U.S. at 76; *Uniformed Sanitation Men Ass'n*, 392 U.S. at 282–283; *Gardner*, 392 U.S. at 278–279; *Spevack*, 385 U.S. at 512–513 (opinion of Douglas, J.); *Slochower*, 350 U.S. at 552–553. The Court thus had no occasion in those cases to consider what actions would—and would not—have violated the required immunity had they spoken.

The exception is *Garrity* itself. Similar to this case, *Garrity* involved police officers and questions of job-related misconduct—there, "alleged fixing of traffic tickets." 385 U.S. at 494. "No immunity was granted" and the officers "answered the questions" put to them. *Id.* at 495. "Over their objections, some of the answers given were used in subsequent prosecutions for conspiracy to obstruct the administration of the traffic laws." *Ibid.* The officers "were convicted," *ibid.*, and this Court reversed.

Garrity's statement of its holding speaks of "use in subsequent criminal proceedings." 385 U.S. at 500; see *ibid.* ("We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office."). Viewed in isolation, this statement is ambiguous about whether it includes "uses" other than at trial. But language in opinions must be viewed in

the context of the case. See *Armour & Co.* v. *Wantock*, 323 U.S. 126, 132–133 (1944) ("remind[ing] counsel that words of our opinions are to be read in the light of the facts of the case under discussion"). And in *Garrity* itself, the only prohibited "use" identified in the Court's opinion was use of the resulting statements "*[a]t the trial*." 385 U.S. at 495 n.2 (emphasis added); accord *id.* at 502 (Harlan, J., dissenting) (noting that portions of the petitioners' statements "were admitted at trial").

3. Even if some types of Fifth Amendment violations could occur before trial, the Court should reject any such notion in the *Garrity* context. Whether or not "[a] constitutional right is traduced the moment torture or its close equivalents are brought to bear," *Chavez*, 538 U.S. at 789 (Kennedy, J., concurring in part and dissenting in part), or "at the time and place police use severe compulsion to extract a statement from a suspect," *id.* at 799 (Ginsburg, J., concurring in part and dissenting in part), the same is emphatically not true when a public employer tells an employee that she may be discharged for refusing to cooperate with an official investigation. To the contrary, this Court has held that "[p]ublic employees *may* constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties" *so long as* "they have not been required to surrender their constitutional immunity." *Cunningham*, 431 U.S. at 806 (emphasis added). Because such determinations cannot be made unless and until there is a "subsequent criminal case in which [the public employee] is a defendant," *Turley*, 414 U.S. at 78, there can be no completed violation in the absence of a trial. Cf. *Chavez*, 538 U.S. at 789 (Kennedy, J., concurring) (agreeing "that failure to give a *Miranda* warning does

not, without more, establish a completed violation when the unwarned interrogation ensues").

D. A contrary rule would hinder efforts to detect and root out official misconduct

From the City's perspective, this matter began when one of its police officers presented his boss with a knife, stating that he had "com[e] into possession of [the knife] while working as a [City] police officer" and "had kept [it] for his personal use." Pet. App. 48a.[14] Governmental employers like the City have a vital and compelling interest in rooting out misconduct and discharging those who betray the public trust. Affirmance of the Tenth Circuit's ruling would frustrate those efforts by exposing municipalities to liability based on actions they can neither control nor predict. See *Owen* v. *City of Independence*, 445 U.S. 622 (1980) (holding that municipalities, unlike individuals, are ineligible for a qualified immunity defense).

1. Given the procedural posture of this case—a motion to dismiss for failure to state a claim—we must assume that Vogt's statements were "compelled" within the meaning of the Fifth Amendment. But matters will rarely be so simple for government officials in the field or in the workplace. Was a person "in custody" or "interrogated" for *Miranda* purposes? Cf. *Oregon* v. *Elstad*, 470 U.S. 298, 316 (1985) (noting the "murky and difficult questions of when 'custody' begins or whether a given unwarned statement will ultimately

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[14] See Pet. App. 49a (stating that Vogt's job offer from the other police department "was conditioned upon [him] reporting the above information and tendering the knife" to the City); *ibid.* (stating that Vogt "complied with the condition of employment imposed by the [other] police department").

be held admissible"). Was a statement "voluntary" under a test that requires examination of "the totality of the circumstances," including education, prior criminal experience, the manner of interrogation, and the existence of threats or inducement? *Arizona* v. *Fulminante*, 499 U.S. 279, 286 & n.2 (1991). Would public employees have understood that "if they did not answer" potentially incriminating questions "they would be removed from office"? *Turley*, 414 U.S. at 80.

2. These questions often will not admit of easy answers. In fact, courts regularly hold suppression hearings to determine whether particular statements or evidence may be used at trial. See 3 Wayne R. LaFave et al., *Criminal Procedure* § 10.1(a) (4th ed. 2016) (stating that "the great majority of jurisdictions have abandoned the contemporaneous objection rule in favor of a requirement that objections be raised before trial by way of a pretrial motion to suppress"); cf. *Jackson* v. *Denno*, 378 U.S. 368, 395 (1964) (holding that the Constitution requires that "a proper determination of voluntariness be made prior to the admission of [a] confession to the jury which is adjudicating guilt or innocence"). At least in general, therefore, the only way an accused's own statements will be used at trial is if the defendant declines to challenge them or if the trial court specifically rules that the statements are admissible.

3. The same will not be true, however, before statements are used during pretrial proceedings. No decision of this Court requires any sort of hearing before a defendant's statements are used in that context. In federal prosecutions, for example, the deadline for ruling on a motion to suppress is "before trial" and can be even later if the court "finds good cause to defer a ruling." Fed. R. Crim. P. 12(d).

To be sure, the State from which this case arose (Kansas) permits a defendant to *file* a suppression motion before the type of hearing at issue here. See Kan. Stat. Ann. § 22–3215(1) (2016) ("Prior to the preliminary examination or trial a defendant may move to suppress as evidence any confession or admission given by him on the ground that it is not admissible as evidence."). Vogt has not claimed that he filed such a motion. Pet. App. 50a (complaint). And even had Vogt done so, it is far from clear whether any such motion would have been resolved before the allegedly compelled statements were used during the preliminary examination itself. Cf. Kan. Stat. Ann. § 22–3215(3) & (5) (2016) (providing that "the court shall conduct a hearing into the merits of the motion," but not providing any timeline for decision other than stating that "[t]he issue of the admissibility of the confession or admission shall not be submitted to the jury").

4. Affirmance of the decision below would create pressure to do at least one of three things. All but the third involve matters over which municipalities like the City have no direct control. And all three would have serious drawbacks as well.

The first option would be to create a procedural system where a judicial officer would resolve all possible Fifth Amendment issues before the defendant's statements are used during any sort of pretrial proceeding. Cf. Pet. App. 19a ("If the Fifth Amendment applies to pretrial proceedings, the evidence would be considered inadmissible in pretrial proceedings as well as at trial."). Municipal governments like the City obviously have no ability to create such a system on their own. At any rate, "[c]riminal justice is already overburdened by the volume of cases and the complexities of

our system," *Gerstein*, 420 U.S. at 122 n.23, and requiring courts to resolve potentially complicated suppression issues *before* conducting other pretrial proceedings could make it difficult for them to comply with other constitutional obligations. See *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 55, 57 (1991) (permitting States to "incorporate" constitutionally mandated bail determinations "into other pretrial procedures," but holding that such "combined proceedings" must occur "no * * * later than 48 hours after arrest").

The second option would be to refrain during all pretrial proceedings from using any evidence that might conceivably later be held to be inadmissible at trial. Municipalities, of course, have no power to make those decisions, and the people who make them are protected by absolute immunity. See *Burns* v. *Reed*, 500 U.S. 478, 487–492 (1991) (prosecutors); *Stump* v. *Sparkman*, 435 U.S. 349, 356–357 (1978) (judges). More fundamentally, forcing courts to conduct pretrial proceedings without access to evidence whose admission they might ultimately find unproblematic at trial would unduly complicate what are supposed to be preliminary determinations about whether to hold such trials in the first place.

The third option would be for government officials (and the governments that employ them) to become even *more* cautious in investigating crime and other misconduct because of the added fear of Section 1983 liability arising from pretrial uses of any resulting statements. But "[v]oluntary confessions are not merely a proper element in law enforcement, they are an unmitigated good," *Maryland* v. *Shatzer*, 559 U.S. 98, 108 (2010) (internal quotation marks and citations omitted), and "the Government, as an employer," has

an "essential" interest in "employee efficiency and discipline." *Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring in part and concurring in the result in part). Adding the prospect of personal (and municipal) liability to the mix every time a government official seeks information from an employee such as Officer Vogt would risk frustrating important "procedures for * * * imposing discipline for failures to act competently and lawfully." *Hudson* v. *Michigan*, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring in part and concurring in the judgment).

E. Other constitutional mechanisms exist for controlling abusive government conduct

Holding that the Self–Incrimination Clause can be violated only at trial will neither sanction nor incentivize abusive government conduct because other constitutional mechanisms exist to restrain it.

1. The prospect of exclusion of evidence at trial itself provides strong disincentive against governmental overreach. Indeed, lack of any "reason to believe that the law has been systemically defective in this respect" was one of the main reasons Justice Souter gave for declining to find "civil liability" in *Chavez*. 538 U.S. at 778–779 (Souter, J., concurring in the judgment); cf. *Quarles*, 467 U.S. at 669 (O'Connor, J., concurring in the judgment) (stating that "suppression * * * should by itself produce the optimal enforcement of the *Miranda* rule").

2. The Self–Incrimination Clause is not the only constitutional check on official misconduct that occurs in connection with an interrogation.

a. Despite the many differences of opinion in *Chavez*, the Court was nearly unanimous that barbaric or abusive forms of interrogation violate the Due

Process Clause, and that they do so whether or not any resulting statements are ever used in court. 538 U.S. at 773–776 (opinion of Thomas, J.); *id.* at 779 (Souter, J., concurring in the judgment); *id.* at 787–788 (Stevens, J., concurring in part and dissenting in part); *id.* at 795–799 (Kennedy, J., concurring in part and dissenting in part). Indeed, the Court specifically remanded for further proceedings on that basis, see *id.* at 779–780 (opinion of the Court by Souter, J.), and, on remand, the court of appeals held that the plaintiff had stated a claim under the Fourteenth Amendment's Due Process Clause. See *Martinez* v. *City of Oxnard*, 337 F.3d 1091, 1092 (9th Cir. 2003) (per curiam).

b. The Fourth, Eighth, and Fourteenth Amendments provide additional protection as well. The constitutional prohibition against "unreasonable searches and seizures," U.S. Const. amend. IV, "provide[s] individuals with protection against the deliberate use of excessive physical force" from initial contact with law enforcement through at least the conclusion of an arrest. *Graham* v. *Connor*, 490 U.S. 386, 395 n.10 (1989). Pretrial detainees are protected "from the use of excessive force that amounts to punishment" by the Due Process Clause and may draw additional protection from the Fourth Amendment as well. *Ibid.*; accord *Kingsley* v. *Hendrickson*, 135 S. Ct. 2466, 2479 (2015) (Alito, J., dissenting) (noting that the Court has "not yet decided" "whether a pretrial detainee can bring a Fourth Amendment claim based on the use of excessive force by a detention facility employee"). And from conviction through release, prisoners are protected from the "excessive and unjustified" use of force by the Eighth Amendment's prohibition against "cruel and unusual punishments." U.S. Const. amend. VIII; *Whitley* v. *Alberts*, 475 U.S. 312, 327 (1986); see also *Hope*

v. *Pelzer*, 536 U.S. 730, 737 (2002) (stating that the Eighth Amendment bars "inflictions of pain * * * that are totally without penological justification" and reversing grant of summary judgment in favor of prison officials) (internal quotation marks and citation omitted).

c. Unlike the plaintiff in *Chavez*, Vogt has no free-standing Due Process claim; nor does he have a claim under any other constitutional provision. As a matter of procedure, Vogt's complaint specifically identifies "Fifth Amendment—Freedom from Self–Incrimination" as the sole basis for his claims. See Pet. App. 51a, 52a. As a matter of substance, Vogt has not and could not allege any governmental conduct "so brutal and so offensive to human dignity," *Rochin* v. *California*, 342 U.S. 165, 174 (1952), or so "arbitrary in the constitutional sense" as to "shock[] the conscience." *County of Sacramento* v. *Lewis*, 523 U.S. 833, 846 (1998) (quotation marks and citation omitted). Nor has Vogt argued that any physical force was ever used against him, much less force that was constitutionally "excessive."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 16-1495

IN THE

Supreme Court of the United States

CITY OF HAYS, KANSAS,

Petitioner,

v.

MATTHEW JACK DWIGHT VOGT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself."

The question presented is:

Whether the prosecution's use of a defendant's compelled testimonial statement at an in-court, adversarial probable cause hearing, held after the defendant has been criminally charged and for the purpose of demonstrating the prosecution has sufficient evidence of the defendant's guilt to seek his conviction and punishment, violates the Fifth Amendment.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

INTRODUCTION 1

CONSTITUTIONAL PROVISION INVOLVED 4

STATEMENT OF THE CASE 4

Petitioner Compels Officer Vogt To Make Incriminating Statements As A Condition Of His Employment 4

Petitioner Initiates A Criminal Investigation That Results In Criminal Charges Against Officer Vogt And The Use Of His Statements As Evidence Of His Guilt At His Probable Cause Hearing 5

The District Court Holds That Use Of Officer Vogt's Compelled Statements At The Probable Cause Hearing Did Not Violate The Fifth Amendment, And The Court Of Appeals Reverses And Remands 7

SUMMARY OF THE ARGUMENT 8

ARGUMENT 13

I. The Text, Purpose, And History Of The Self-Incrimination Clause Foreclose Petitioner's Effort To Exclude The Probable Cause Hearing Against Officer Vogt From Fifth Amendment Protection..... 13

A. Petitioner identifies no plausible textual basis for excluding the probable cause hearing here from Fifth Amendment protection. 15

B. The purpose and history of the Self-Incrimination Clause confirm its protections extend to the probable cause hearing here. 25

C. This Court's precedent confirms that the Self-Incrimination Clause applies to the probable cause hearing here. 34

D. Petitioner's arguments about grand jury proceedings do not support excluding from the Fifth Amendment's protections an in-court, adversarial probable cause hearing following the initiation of criminal charges against the defendant. 45

II. Petitioner's Policy Concerns Do Not Justify Limiting The Fifth Amendment's Protections. 47

A. The Fifth Amendment accommodates governmental interests. 48

B. Courts can accommodate the Fifth Amendment. 53

C. Other constitutional protections are inadequate to safeguard defendants. 56

CONCLUSION 60

TABLE OF AUTHORITIES

Page(s)

Cases

Barber v. Page,
390 U.S. 719 (1968).....24

Blyew v. United States,
80 U.S. (13 Wall.) 581 (1871).....16

Brown v. Walker,
161 U.S. 591 (1896).....2, 27

Chavez v. Martinez,
538 U.S. 760 (2003).....15, 16, 25, 36, 43, 44, 59

Coleman v. Alabama,
399 U.S. 1 (1970).....39, 47

Costello v. United States,
350 U.S. 359 (1956).....46

Counselman v. Hitchcock,
142 U.S. 547 (1892).....17, 25

Crawford v. Washington,
541 U.S. 36 (2004).....20, 22

Cruz v. New York,
481 U.S. 186 (1987).....25

Davis v. Washington,
547 U.S. 813 (2006).....2, 20

Doe v. United States,
487 U.S. 201 (1988).....19, 31

Estelle v. Smith,
451 U.S. 454 (1981).....3, 38

Ferguson v. Georgia,
365 U.S. 570 (1961).....22, 31

Garrity v. New Jersey,
385 U.S. 493 (1967).....19, 37, 49

In re Gault,
387 U.S. 1 (1967).....28

Gerstein v. Pugh,
420 U.S. 103 (1975).....21, 24, 39, 54

In re Grand Jury (John Doe),
478 F.3d 581 (4th Cir. 2007).....50

In re Grand Jury Subpoena (Huntington Beach Police Officers Assoc.),
75 F.3d 446 (9th Cir. 1996).....50

In re Grand Jury Subpoena (Stover),
40 F.3d 1096 (10th Cir. 1994).....50, 56

Halbert v. Michigan,
545 U.S. 605 (2005).....47

Hiibel v. Sixth Judicial Dist. Ct. of Nev.,
542 U.S. 177 (2004).....19, 20, 28

Hoffman v. United States,
341 U.S. 479 (1951).....28, 49

Jackson v. Denno,
378 U.S. 368 (1964).....54

Kalkines v. United States,
472 F.2d 1391 (Ct. Cl. 1973).....51

Kastigar v. United States,
406 U.S. 441 (1972).....3, 28, 39, 40, 41, 52, 53, 56, 58, 59

Lafler v. Cooper,
566 U.S. 156 (2012).....57

Lefkowitz v. Turley,
414 U.S. 70 (1973).....21, 49, 59

Malloy v. Hogan,
378 U.S. 1 (1964).....26

McCarthy v. Arndstein,
266 U.S. 34 (1924).....28

Melendez-Diaz v. Massachusetts,
557 U.S. 305 (2009).....25, 54

Michigan v. Tucker,
417 U.S. 433 (1974).....26

Miranda v. Arizona,
384 U.S. 436 (1966).....31

Mitchell v. United States,
526 U.S. 314 (1999).....3, 26, 30, 37, 38, 57

Murphy v. Waterfront Comm'n of N.Y. Harbor,
378 U.S. 52 (1964).....26, 41, 49

New York v. Quarles,
467 U.S. 649 (1984).....36

Ohio v. Clark,
135 S. Ct. 2173 (2015).....19

Pennsylvania v. Muniz,
496 U.S. 582 (1990).....19

Press-Enterprise Co. v. Superior Court of Cal.,
478 U.S. 1 (1986).....17, 39, 58

Rothgery v. Gillespie Cty.,
554 U.S. 191 (2008).....17, 18, 25

Ullmann v. United States,
350 U.S. 422 (1956).....29, 52

United States v. Calandra,
414 U.S. 338 (1974).....46

United States v. Gecas,
120 F.3d 1419 (11th Cir. 1997).....23, 31, 33

United States v. Gouveia,
467 U.S. 180 (1984).....18

United States v. Hubbell,
530 U.S. 27 (2000).....2, 19, 20, 21, 41, 42, 43, 56

United States v. North,
910 F.2d 843 (D.C. Cir. 1990).....56

United States v. Palmquist,
712 F.3d 640 (1st Cir. 2013).....51

United States v. Patane,
542 U.S. 630 (2004).....36

United States v. Verdugo-Urquidez,
494 U.S. 259 (1990).....35

United States v. Washington,
431 U.S. 181 (1977).....21

United States v. White,
322 U.S. 694 (1944).....49

United States v. Williams,
504 U.S. 36 (1992).....24, 45, 46

Waller v. Georgia,
467 U.S. 39 (1984).....39

Withrow v. Williams,
507 U.S. 680 (1993).....26, 30, 36

Constitutional Provisions

U.S. Const. amend. V.....1, 8, 13

Statutes

18 U.S.C. § 4244.....38

18 U.S.C. § 6002.....40

42 U.S.C. § 1983.....48

Kan. Stat. § 22-2202(g).....16

Kan. Stat. § 22-2301.....17

Kan. Stat. § 22-2902 ..... 6, 17, 29, 55

Kan. Stat. § 22-2902c 55

Kan. Stat. § 22-3215 55

Tex. Code Crim. Proc. Ann., Art. 46.02(g) 38

Rules

Fed. R. Crim. P. 5.1(d) 55

Fed. R. Crim. P. 12.2(c)(4) 38

Other Authorities

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Memorandum from Christopher A. Wray, Assistant Attorney General, to All Federal Prosecutors (May 6, 2005), https://tinyurl.com/yb6c9fg2 51

INTRODUCTION

As Petitioner observes, this case presents "a straightforward question of law," Pet. Br. 9: Did the use of Respondent Matthew Vogt's compelled testimonial statement at an in-court, adversarial probable cause hearing, held after he had been criminally charged and for the purpose of demonstrating the prosecution had sufficient evidence of his guilt to seek his conviction and punishment, violate the Fifth Amendment?

Whatever ambiguities the Fifth Amendment allows, the answer to that question is not among them. The Self-Incrimination Clause prohibits the government from "compel[ling]" a person "to be a witness against himself" "in any criminal case." U.S. Const. amend. V. There is no dispute before this Court that Officer Vogt's statements were compelled by Petitioner and implicated him in criminal conduct. *See* Pet. Br. 3, 26. And there is no dispute that those statements were testimonial and admitted in an adversarial courtroom proceeding as evidence he was guilty of the charged crimes. Pet. Br. 4. This scenario checks all of the Clause's boxes: Officer Vogt was "compelled" to make a testimonial statement about his participation in the charged offense—i.e., he acted as a "witness"—and his compelled statement was then used "against hi[m]" in a "criminal case."

Remarkably, Petitioner now abandons the supposed ambiguity at the crux of the parties' dispute thus far: Whether the term "criminal case" refers only to criminal trials, or also includes the probable cause

hearing at issue here. This concession is to Petitioner's credit. The Tenth Circuit was plainly correct that the text, history, and purpose of the Fifth Amendment, as well as the precedent of this Court, establish that the probable cause hearing against Office Vogt was part of his "criminal case." Pet. App. 5a-19a.

Petitioner instead argues that even if the probable cause hearing was part of the criminal case against Officer Vogt, the phrase "witness against himself" limits the Fifth Amendment's protection to criminal trials. But Petitioner does not and cannot contest that Officer Vogt's statements were testimonial—i.e., they "relate[d] [to] either express or implied assertions of fact or belief"—which is precisely what makes someone a "witness" under this Court's precedent. *See, e.g., United States v. Hubbell*, 530 U.S. 27, 35 (2000); *Davis v. Washington*, 547 U.S. 813, 830 (2006). Nor does Petitioner contest that the statements were used at the probable cause hearing *as evidence of Officer Vogt's criminal guilt* and for the specific purpose of pursuing his criminal conviction and punishment. This incriminating use rendered Officer Vogt a "witness against himself" under any plausible definition of the term.

The purpose and history of the Fifth Amendment confirms that the Framers intended the Self-Incrimination Clause to apply according to its plain meaning. Petitioner makes much of the notion that the Fifth Amendment does not protect against "embarrassment, personal disgrace or opprobrium," Pet. Br. 16 (quoting *Brown v. Walker*, 161 U.S. 591, 605 (1896))

(internal quotation marks omitted). But the prosecution did not present Officer Vogt's statements as evidence at the probable cause hearing in order to embarrass him; the point was to persuade the judge that the prosecution had sufficient evidence of Officer Vogt's guilt to continue with the prosecution and ultimately convict and punish him. This Court has long recognized that such "enlist[ment] [of] the defendant as an instrument in his ... own condemnation" is antithetical to the Fifth Amendment. *Mitchell v. United States*, 526 U.S. 314, 325 (1999).

Unable to find any meaningful support for its "witness against himself" theory, Petitioner resorts to snippets of dicta describing the Fifth Amendment as a "trial right," Pet. Br. 9-15, all from cases in which the Court had no reason to consider the use of compelled testimony in criminal proceedings apart from the trial itself. That those cases use the term "trial right" only as imprecise shorthand is evident from the numerous cases in which the Court has directly confronted the scope of the Self-Incrimination Clause and held that it is *not* limited to trial proceedings. *See, e.g.*, *Mitchell*, 526 U.S. at 327; *Estelle v. Smith*, 451 U.S. 454, 462-63 (1981); *Kastigar v. United States*, 406 U.S. 441, 449 (1972).

Ultimately, Petitioner is left to argue that the Court should limit the Self-Incrimination Clause to criminal trials in the name of public policy. But the rule adopted by the Tenth Circuit and several other courts of appeals is easily administrable and appropriately balances the interests of the prosecution and the accused. Preserving the status quo would in any

event furnish no reason to diminish an essential constitutional protection.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment states in relevant part that "No person ... shall be compelled in any criminal case to be a witness against himself."

STATEMENT OF THE CASE

Petitioner Compels Officer Vogt To Make Incriminating Statements As A Condition Of His Employment[1]

Respondent Matthew Vogt was employed as a police officer for Petitioner City of Hays. In late 2013, he applied for a job with the police department of a separate municipality in Kansas: the City of Haysville. Pet. App. 2a, 48a. During that hiring process, Officer Vogt disclosed that he had kept a knife he obtained while working as a Hays police officer. *Id.* Haysville offered Officer Vogt a job, conditioned upon his reporting his possession of the knife and returning it to the Hays police department. Pet. App. 2a-3a, 48a-49a.

Officer Vogt then reported and returned the knife to the Hays police department. Pet. App. 2a-3a, 49a. The Hays police chief responded by opening an internal investigation to determine whether Officer Vogt had violated the department's administrative policies. Pet. App. 49a. As part of that inquiry, the police

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[1] Officer Vogt's factual recitation relies on his complaint, as is required where, as here, the proceedings are at the pleading stage.

chief ordered Officer Vogt to document the facts concerning his possession of the knife, and explained that his compliance was a condition of keeping his job with the Hays police department. Pet. App. 3a, 49a. Officer Vogt followed the order and provided a one-sentence report about the knife. *Id.* He then gave the Hays police department two weeks' notice, intending to accept the new job in Haysville. *Id.*

The police officer in charge of the Hays investigation subsequently required Officer Vogt to provide a more detailed statement. He again complied and this time provided additional information about his possession of the knife. Pet. App. 3a, 49a-50a.[2] The Hays police department used the details from Officer Vogt's second statement to locate additional evidence, including an audio recording describing how Officer Vogt acquired the knife. *Id.*

Petitioner Initiates A Criminal Investigation That Results In Criminal Charges Against Officer Vogt And The Use Of His Statements As Evidence Of His Guilt At His Probable Cause Hearing

Based on Officer Vogt's statements and the additional evidence obtained through the police department's inquiry, the Hays police chief asked the Kansas Bureau of Investigation to start a criminal in-

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[2] This Court should disregard the government's account of the substance of Mr. Vogt's statements, *see* U.S. Br. 2, which relies on a factual representation made by Petitioner's trial counsel that is concededly "outside the pleadings." C.A. App. 60 n.1.

vestigation. Pet. App. 3a, 50a. The Hays police department provided the Bureau with all the evidence it had obtained from its internal investigation, including Officer Vogt's compelled statements and the audio recording. *Id.* As a result of the criminal investigation, the Haysville police department withdrew Officer Vogt's job offer. *Id.*

In early 2014, Officer Vogt was charged with two felony counts related to his possession of the knife, and criminal proceedings commenced in Ellis County, Kansas district court. *Id.* Later that year, the district court conducted a probable cause hearing. At that hearing, the prosecution was required to establish "probable cause to believe that a felony ha[d] been committed" by Officer Vogt. Kan. Stat. § 22-2902(3). If the prosecution failed to meet that burden, Officer Vogt had to be "discharge[d]." *Id.* Officer Vogt was entitled to be present at the hearing, to cross-examine witnesses, and to present "evidence in [his] own behalf." *Id.*

Officer Vogt's compelled statements and the evidence obtained as a result of those statements were admitted at the hearing as evidence of his guilt. Pet. App. 20a, 50a. A state magistrate judge and district court judge subsequently ruled that probable cause was lacking. Pet. App. 3a, 50a-51a. Accordingly, in early 2015, the criminal charges against Officer Vogt were dismissed.

The District Court Holds That Use Of Officer Vogt's Compelled Statements At The Probable Cause Hearing Did Not Violate The Fifth Amendment, And The Court Of Appeals Reverses And Remands

Following the dismissal of the criminal charges, Officer Vogt filed this action in Kansas federal district court under 42 U.S.C. § 1983. His suit named as defendants Petitioner, the City of Haysville, and certain Hays and Haysville officials in their individual and official capacities. Officer Vogt's complaint alleged, among other things, that the use of his compelled statements in the criminal case against him violated his Fifth Amendment rights. Pet. App. 1a, 3a-4a, 46a-54a.

The defendants, including Petitioner, moved to dismiss for failure to state a claim. The district court granted the dismissal motions, holding that Officer Vogt failed to plead a Fifth Amendment violation. Pet. App. 35a-44a. The district court found it dispositive that Officer Vogt's compelled statements "were never introduced against [him] at trial," even though "the compelled statements were allegedly used in obtaining the criminal charges and in the probable cause hearing." Pet. App. 43a.

On appeal, the Tenth Circuit affirmed dismissal of Haysville on the ground that it did not compel Officer Vogt's statements, and it affirmed dismissal of the individual officers based on qualified immunity. Pet. App. 20a. With respect to Petitioner, the Court of Appeals held that Officer Vogt had stated a plausible

claim for relief, and thus remanded for further proceedings. Pet. App. 2a, 33a.

In concluding that Officer Vogt stated a claim against Petitioner, the Tenth Circuit reversed the district court's holding that the Fifth Amendment is not violated unless the compelled statements are used at a trial. The Court of Appeals relied on the text of the Self-Incrimination Clause, which provides that "No person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. After considering the term "criminal case" on its face and drawing a textual comparison with neighboring amendments, the Tenth Circuit determined that the term covers proceedings beyond the trial itself, including the probable cause hearing against Officer Vogt. Pet. App. 10a-11a. It also undertook a detailed examination of the Clause's original meaning, which it found to be consistent with the provision's text. Pet. App. 11a-19a.

The Court of Appeals then concluded that because Officer Vogt sufficiently "alleged that his compelled statements had been used in a probable cause hearing," he adequately "pleaded a Fifth Amendment violation consisting of the use of his statements in a criminal case." Pet. App. 20a.

SUMMARY OF THE ARGUMENT

I. The Self-Incrimination Clause provides that "no person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Clause's text, purpose, and history, along with

this Court's decisions applying it, confirm that a Fifth Amendment violation occurred here.

A. The Self-Incrimination Clause extends its protections to "any criminal case." Petitioner does not dispute that "criminal case" includes the probable cause hearing here, which was an adversarial proceeding before a judge that took place after Officer Vogt was criminally charged and was held for the purpose of assessing the evidence of his guilt. Petitioner now argues instead that the phrase "witness against himself" limits the Clause's protection to criminal trials, but that phrase simply describes the type of evidence covered by the Clause—namely, evidence that is testimonial and incriminating in character. The phrase "in a criminal case," by contrast, describes the setting in which the proscription applies. A defendant is just as much a "witness against himself" when his compelled, incriminating, and testimonial statement is admitted as evidence of his guilt at an in-court probable cause hearing as he would be if it were admitted at a subsequent trial.

B. The courtroom use of Officer Vogt's compelled testimony at the probable cause hearing to demonstrate his criminal guilt is directly contrary to the purpose of the Fifth Amendment, which is designed to prevent incriminating uses of statements throughout a criminal case, not just in the proceedings that ultimately determine guilt and punishment. Neither Petitioner (nor the government as amicus) offers any serious argument that the particular use of compelled, incriminating testimony that took place here—in an in-court, adversarial probable cause hearing for the purpose of assessing the evidence of

the defendant's guilt and without which there can be no criminal conviction—is so divorced from the ultimate determination of guilt and punishment that it might fall outside of the Clause's protections.

Historical practice confirms the Framers intended the protections of the Fifth Amendment to apply to pretrial proceedings like Officer Vogt's probable cause hearing. At common law, the prosecution could not compel incriminating testimony from a defendant before or during the criminal case (pretrial and at trial). The privilege thus guaranteed that compelled testimony could not be used at any point in the criminal case. In arguing otherwise, the government identifies nothing in the historical record suggesting that the Framers intended to limit the prohibitions on the use of compelled testimony to trials only.

C. This Court's precedents confirm that the Self-Incrimination Clause applies to the probable cause hearing here. None of the cases relied on by Petitioner called upon the Court to consider the use of compelled testimony during criminal proceedings apart from a trial itself. Any reference to "trial" was simply imprecise shorthand reflecting the distinction between rights that can be violated outside of the criminal process (e.g., the Fourth Amendment) and Fifth Amendment violations, which must be linked to a "criminal case."

Moreover, the Court's determination that the Self-Incrimination Clause's protections apply to sentencing proceedings forecloses Petitioner's literal reading of the "trial right" dicta it relies on so heavily. And the Court's witness immunity cases confirm that

pretrial uses of compelled testimony may indeed violate the Fifth Amendment. These cases—and the broad protections they articulate against any use by the prosecution that may "lead" to criminal penalties—do not condition Fifth Amendment violations on use in a proceeding that ultimately assesses guilt or punishment.

D. Petitioner's arguments about grand jury proceedings are a distraction. The Court need not consider the Self-Incrimination Clause's application in grand jury proceedings to affirm the decision below. Even accepting the premise that facially valid indictments generally cannot be challenged as founded on compelled testimony, *see* Pet. Br. 19, that would at most shield pre-*indictment* uses of compelled statements from Fifth Amendment scrutiny. Here, however, the use took place after charges were filed, and in an adversarial courtroom proceeding.

II. Petitioner's and the government's policy concerns are largely irrelevant and at best overstated.

A. Applying the Fifth Amendment to proceedings like Officer Vogt's probable cause hearing would have no adverse impact on the government's interest in rooting out employee misconduct. To the contrary, entities like Petitioner are free to compel incriminating information from their employees so long as they do not then cause those statements to be used in a criminal case. Law enforcement agencies around the country have developed effective means of accommodating both law enforcement interests and the Fifth Amendment interests of government employees. In light of

these established procedures and the well-settled expectations underlying immunity doctrines, Petitioner's rule would only hinder state and federal investigatory efforts because the threat of criminal prosecution—even short of trial—would undermine government employees' incentive to cooperate. In any event, even if the Fifth Amendment imposed additional burdens on law enforcement, the need to safeguard individuals from compelled self-incrimination would transcend that interest.

B. Both Petitioner and the government speculate that this Court's affirmance of the Tenth Circuit's holding will create difficulties for the courts (and prosecutors) because they will have to find new ways, earlier in the case, to adjudicate questions about whether a statement is protected by the Fifth Amendment. They identify no evidence, however, that pretrial proceedings have become unworkable in the circuits with the same rule as the Tenth Circuit. And if some jurisdictions' procedures would need adjustment to accommodate the Fifth Amendment's proper scope, that consequence would be unremarkable in light of this Court's precedent requiring state and federal courts to adopt additional procedures when the Constitution so requires.

C. The other constitutional protections identified by Petitioner are not adequate alternatives for safeguarding defendants. Protection from the use of compelled statements at trial is insufficient given the probable cause hearing's crucial role in affording the defendant a chance to avoid trial in the first place. Indeed, for many defendants, the probable cause hearing will be the only significant in-court criminal

proceeding—and the only chance to prevail in a criminal case—as the vast majority of criminal cases end in pleas. Petitioner's rule will embolden prosecutors to bring questionable cases, and defendants will be unable to effectively test the case against them at the probable cause hearing. Petitioner's discussion of protections under the Fourth, Eighth, and Fourteenth Amendments misses the point. Officer Vogt has sufficiently alleged a violation of the Fifth Amendment based on the use of compelled statements, not their manner of extraction.

ARGUMENT

I. The Text, Purpose, And History Of The Self-Incrimination Clause Foreclose Petitioner's Effort To Exclude The Probable Cause Hearing Against Officer Vogt From Fifth Amendment Protection.

The Self-Incrimination Clause applies unambiguously to this case. The Clause prohibits the government from "compel[ling]" a person "to be a witness against himself" "in any criminal case." U.S. Const. amend. V. There is no dispute before this Court that Officer Vogt's statements were compelled, testimonial, and implicated him in a crime *See* Pet. Br. 3, 26. There also is no dispute that after Officer Vogt was criminally charged, those statements were admitted in an in-court, adversarial probable cause hearing as evidence that he was guilty of the charged crimes. Pet.

Br. 3-4.[3] And as of the filing of Petitioner's merits brief, there is no longer even a dispute that the term "criminal case" covers the probable cause hearing in which Officer Vogt's statements were used against him.

Instead, Petitioner's lone theory is that the phrase "witness against himself" limits the Self-Incrimination Clause's protections to "trials," thereby excluding probable cause hearings. The government advances a variant of this argument, contending that the right is violated only when statements are used to "adjudicate guilt or punishment," U.S. Br. 11, which, according to the government, does not include a court's assessment of the evidence of guilt at a probable cause hearing.

These proposed limitations on the Self-Incrimination Clause have no basis in its text, purpose, or history, or in this Court's decisions applying it. To the contrary, every indication confirms that a Fifth Amendment violation occurs where, as here, a compelled statement is used against a defendant in his "criminal case" for the purpose of showing the defendant committed the charged offense.

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[3] The Tenth Circuit rejected defendants' contention that Officer Vogt was not entitled at the motion-to-dismiss stage to an inference that his alleged compelled statements were "admitted into evidence through witness testimony." Pet. App. 20a & n.17 (internal quotation marks omitted). That holding is not before this Court. Pet. Br. 9.

A. Petitioner identifies no plausible textual basis for excluding the probable cause hearing here from Fifth Amendment protection.

1. Conspicuously absent from both Petitioner's brief and the government's brief is any serious engagement with the Fifth Amendment's text. If the Framers had intended to confine the Self-Incrimination Clause to trials, they easily could have drafted it as such: For example, "[n]o person ... shall be compelled in any criminal *trial* to be a witness against himself," or "[n]o person ... shall be compelled, in any criminal *proceeding where guilt and punishment are determined,* to be a witness against himself."

Instead, the Framers chose to extend the Self-Incrimination Clause's protections to "any criminal *case*." The meaning of "criminal case"—and in particular whether that term includes a probable cause hearing held after a defendant has been charged with a crime—has thus been at the crux of the parties' dispute until now. That is where the district court and Tenth Circuit focused their inquiries in the proceedings below. Pet. App. 4a, 39a. That is the issue that Petitioner, at the certiorari stage, understood to underlie its Question Presented. *E.g.*, Pet. 4 (endorsing the Tenth Circuit's identification of a "circuit split [that has] developed," following *Chavez v. Martinez*, 538 U.S. 760 (2003), "over the definition of a 'criminal case' under the Fifth Amendment"). And that is where a majority of this Court looked when presented with a related question in *Chavez*. *See* 538 U.S. at 766-67 (plurality opinion); *id.* at 777 (opinion of Souter, J., concurring in the judgment).

This framing of the question, however, creates an obvious problem for Petitioner. Although the Court has not yet decided the "precise moment when a 'criminal case' commences," *Chavez*, 538 U.S. at 767 (plurality opinion), there is no conceivable textual or doctrinal reason to read the term "criminal case" as excluding probable cause hearings like the one here: an adversarial courtroom proceeding that takes place after charges are filed and for the sole purpose of assessing the evidence of the defendant's guilt.

According to Framing-era sources, "case" meant "[a] cause or suit in court" and was "nearly synonymous with cause." 1 Noah Webster, *An American Dictionary of the English Language* (1828). "Cause," in turn, was simply "a suit or action in court; any legal process which a party institutes to obtain his demand." *Id.* Contemporary dictionaries define "case" in much the same way. *See, e.g.*, Black's Law Dictionary 258 (10th ed. 2014) ("A civil or criminal proceeding, action, suit, or controversy at law or in equity."). And when called upon to define "case" in analogous contexts—for example, interpreting the "case" requirement of Article III—this Court has defined case to mean "a proceeding in court, a suit, or action." *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 595 (1871).

The Tenth Circuit thus was plainly correct to conclude that a "criminal case" encompasses the probable cause hearing here. Officer Vogt was "charged" "with two felony counts related to his possession of the knife." Pet. App. 50a. Those charges initiated formal adversarial legal proceedings against him. Kan. Stat. § 22-2202(g) (definition of "charge"); *see also id.*

§ 22-2301 ("[A] prosecution shall be commenced by filing a complaint with a magistrate."). As a consequence, the Kansas district court opened a case against Officer Vogt (docket number 14CR-285), Pet. App. 50a, and Officer Vogt became entitled to a probable cause hearing. Kan. Stat. § 22-2902(1) ("[T]he state and every person *charged* with a felony shall have a right to a preliminary examination." (emphasis added)). By the time the hearing occurred, Officer Vogt's criminal case was well under way.[4]

The Tenth Circuit's interpretation of "criminal case" is also compelled by precedent. This Court has long recognized that the term covers at least the same proceedings as does the term "criminal prosecution" in the Sixth Amendment. *See Counselman v. Hitchcock*, 142 U.S. 547, 562-63 (1892), *overruled on other grounds by Kastigar v. United States*, 406 U.S. 441 (1972); *see also Rothgery v. Gillespie Cty.*, 554 U.S. 191, 222 (2008) (Thomas, J., dissenting) (citing *Counselman* for the proposition that "a 'criminal case' under the Fifth Amendment is much broader than a 'criminal prosecution' under the Sixth Amendment").

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[4] The critical role Officer Vogt's probable cause hearing played in the criminal process confirms that the proceeding was a central part of his criminal case. Absent a plea, a decision to proceed by grand jury indictment, or waiver of the hearing by the defendant, every felony conviction in Kansas depends on the prosecution meeting its burden at a probable cause hearing. Kan. Stat. § 22-2902(1), (3). If the prosecution does not establish probable cause, the defendant's case must be dismissed. *Id.* § 22-2902(3). As this Court observed, a probable cause hearing is "often the final and most important step in the criminal proceeding." *Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1, 12 (1986).

A "criminal prosecution" commences no later than upon "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, *preliminary hearing*, indictment, information, or arraignment." *Rothgery*, 554 U.S. at 198 (majority opinion) (emphasis added) (quoting *United States v. Gouveia*, 467 U.S. 180, 188 (1984)). If, as *Rothgery* holds, a "criminal prosecution" covers a preliminary hearing like the one here, then the same must be true of a "criminal case" under the Fifth Amendment.

2. Remarkably, Petitioner no longer argues to the contrary. Petitioner's merits brief wholly abandons Petitioner's prior position that Officer Vogt's probable cause hearing falls outside the scope of a Fifth Amendment "criminal case." Pet. Br. 5, 9. The government also declines to take issue with the Tenth Circuit's conclusion on this front. U.S. Br. 9-10.

Instead, they argue that even if the probable cause hearing was part of the criminal case against Officer Vogt, it falls outside the Clause's protections because the phrase "witness against himself" limits the proceedings protected by the Self-Incrimination Clause to criminal trials, Pet. Br. 5, 9, or other "proceedings [that] expose a defendant to the risk of conviction or punishment." U.S. Br. 11.

This change in strategy, however, just replaces Petitioner's first insurmountable textual problem with a second: Whatever constraints the phrase "witness against himself" may impose on the Clause's application, it provides no basis for excluding the circumstances here, where the compelled statements were used in an adversarial courtroom proceeding as

evidence that the defendant was guilty of the charged crime.

This Court has explained that a defendant becomes a "witness against himself" when he makes "incriminating communications ... that are 'testimonial' in character." *United States v. Hubbell*, 530 U.S. 27, 34 (2000); *see also id.* at 49-50 (Thomas, J., concurring) ("The Court's opinion ... essentially defines 'witness' as a person who provides testimony, and thus restricts the Fifth Amendment's ban to only those communications 'that are testimonial in character.'"); *Garrity v. New Jersey*, 385 U.S. 493, 495, 500 (1967) (finding Fifth Amendment violation where police officers' compelled and incriminating out-of-court statements made during an official investigation "were used in subsequent prosecutions"); *accord Ohio v. Clark*, 135 S. Ct. 2173, 2179 (2015) ("'witnesses,' under the Confrontation Clause, are those 'who bear testimony'").

The phrase "witness against himself" thus limits the Self-Incrimination Clause's protections in two ways: The word "witness" requires the statements to be testimonial, i.e., to "relate[] either express or implied assertions of fact or belief." *Hubbell*, 530 U.S. at 35 (citing *Pennsylvania v. Muniz*, 496 U.S. 582, 594-98 (1990)); *see also Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 542 U.S. 177, 189 (2004) ("[T]o be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." (alteration in original) (quoting *Doe v. United States*, 487 U.S. 201, 210 (1988))). And

"against himself" requires that the testimonial statement be "incriminating." *Hubbell*, 530 U.S. at 34; *see also Hiibel*, 542 U.S. at 189.

This understanding is consistent with the historical definition of witness: someone who "bears testimony" by providing a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (quoting 2 Noah Webster, *An American Dictionary of the English Language* (1828)). Under this standard, a person is not a "witness against himself," for example, when he is forced "to put on a shirt, to provide a blood sample or handwriting exemplar, or to make a recording of his voice." *Hubbell*, 530 U.S. at 35 (footnotes omitted). But where, as here, a defendant makes a statement about possible criminal conduct to government officials during an investigation, it is plainly testimonial.

As these examples demonstrate, whether someone acts as a "witness against himself" turns on the nature of the evidence given and circumstances surrounding that person's statement at the time it is made, not how or when the prosecution later uses that statement. *See Davis v. Washington*, 547 U.S. 813, 830 (2006) (a statement is testimonial when made in "response to police questioning" about how "potentially criminal past events began and progressed."). In other words, the phrase "witness against himself" describes the type of evidence that cannot be used under the Self-Incrimination Clause, while the phrase "in a criminal case" describes the setting in which the proscription applies.

As further evidence that "witness against himself" does not limit the Self-Incrimination Clause to criminal trials, this Court has described individuals as witnesses in a variety of *pretrial* contexts, including when their testimony comes in the "grand jury room," *United States v. Washington*, 431 U.S. 181, 187-88 (1977), as part of "any investigation," *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (citation omitted), or in response to a pretrial subpoena, *see Hubbell*, 530 U.S. at 36. The Court has specifically used the word "witness" when describing the role of a person giving evidence at preliminary hearings like the one at issue here. *See Gerstein v. Pugh*, 420 U.S. 103, 122-23 (1975). Some of these examples may even be *outside* of the "criminal case," but the individuals were nonetheless witnesses; what made the person a "witness" was that he was providing incriminating testimony, regardless whether that testimony would be used at trial.

Petitioner's proposed interpretation not only defies this Court's precedent, it is also contrary to common sense. All agree that a defendant is a "witness against himself" if the defendant's testimonial statement is used by the prosecution at trial as evidence of his guilt.[5] But neither Petitioner nor the government

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[5] Petitioner and the government both correctly decline to argue the word "witness" refers only to a defendant physically taking the stand at trial. *See* Pet. Br. 6 (acknowledging that a defendant is a "witness" for purposes of the Self-Incrimination Clause when his "own compelled statements are introduced against [him] at trial," even if the defendant is not "forced to take the witness stand"); U.S. Br. 6, 15 (focusing solely on the character of proceedings in which a witness's "statements are used").

offers any explanation for why a defendant would be any less a "witness against himself" if his compelled incriminating statement is used by the prosecution in court as evidence of his guilt at a probable cause hearing. A person providing self-incriminating testimony at a probable cause hearing—or whose prior factual admissions are used at that hearing—has had evidence used against him that is just as testimonial as a compelled statement made at or for use at trial.

Petitioner's proposed definition of "witness against himself" also contradicts what the Framers understood the term to mean, as reflected by criminal procedure at the time. Under common law, a defendant was barred from being a "witness" at his own trial, *see Ferguson v. Georgia*, 365 U.S. 570, 574 (1961); Pet. App. 17a, so the Framers could not possibly have intended the phrase to cover statements made by the defendant only at the trial itself.

As discussed in more detail below, *infra* at 31-32, the most common Framing-era proceeding at which a defendant was required to provide incriminating factual material that could be used against him—that is, to be a "witness against himself"—was not trial but a

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As this Court has explained in the Sixth Amendment context, "one could plausibly read 'witnesses against' a defendant to mean those who actually testify at trial ... *those whose statements are offered at trial*, ... or something in-between." *Crawford*, 541 U.S. at 42-43 (emphasis added). Because the Self-Incrimination Clause covers more than the Confrontation Clause, it must also protect the introduction of statements at trial. *See* U.S. Br. n.14.

pretrial proceeding authorized by English statutory law (the Marian Committal Statute of 1555) and imported into American practice. At that pretrial proceeding, a justice of the peace was authorized to interrogate accused felons and any accusing witnesses in order to gather incriminating evidence against the accused. Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 Mich. L. Rev. 1086, 1095-98 (1994); Albert W. Alschuler, *A Peculiar Privilege In Historical Perspective: The Right to Remain Silent*, 94 Mich. L. Rev. 2625, 2654-59 (1996). In this way, the defendant was asked to be a witness against himself (even if common law principles, which prevented the uses of oaths and other compulsion, prevented him from being *compelled* to be such a witness). Alschuler, *supra*, at 2657-59; John H. Langbein, *The Historical Origins of the Privilege Against Self Incrimination At Common Law*, 92 Mich. L. Rev. 1047, 1061 (1994).

Moreover, the Framers specifically referred to those examined in that pretrial proceeding as witnesses. Framing-era treatises and manuals used the term "witness" to describe someone who provided testimony against the accused during the pretrial committal procedure. *The Conductor Generalis* 176-178 (J. Parker ed. 1788) (referring to those providing evidence against a defendant in pretrial proceeding as "witnesses"); 1 Matthew Hale, *The History of the Pleas of the Crown* 586 (1800); 1 Richard Burn, *The Justice of the Peace and Parish Officer* 315-16 (1756); *see also United States v. Gecas*, 120 F.3d 1419, 1444 (11th Cir. 1997) (justice of the peace "manuals of the time" provided that "judges should not question suspects under

oath at the preliminary examination" but permitted them "to interrogate *witnesses* under oath." (emphasis added)).

3. To the extent Petitioner and the government offer any textual explanation for their proposed limitations on the Fifth Amendment, it is only that the Sixth Amendment also uses the word "witness," and this Court has indicated that the rights protected by that Amendment do not necessarily extend to grand jury and other pretrial proceedings. *See* Pet. Br. 22; U.S. Br. 14-16.

But this Court has never suggested the Sixth Amendment is trial-oriented because it uses the word "witness." Rather, that trial focus reflects the fact that the Sixth Amendment extends only to "criminal prosecutions," and, depending on the right at issue, only parts of that "criminal prosecution." *See, e.g.*, *United States v. Williams*, 504 U.S. 36, 49 (1992) (referring to "the grand jury proceeding's status as other than a constituent element of a 'criminal prosecutio[n]'"); *Gerstein*, 420 U.S. at 122 (holding that the preliminary determination of probable cause to extend pretrial detention is "not a 'critical stage' in the prosecution" for Sixth Amendment purposes); *cf. Barber v. Page*, 390 U.S. 719, 725 (1968) (cross-examination at a preliminary hearing does not substitute for cross-examination at trial due to the particular need "for the jury to weigh the demeanor of the witness"). As noted earlier, *supra* at 17-18, this Court has long recognized that the Framers' use of the term "criminal prosecution" in the Sixth Amendment as compared to "criminal case" in the Fifth Amendment is why the former is "much narrower" than the latter.

Counselman, 142 U.S. at 563 (grand jury proceedings are part of a "criminal case" under the Fifth Amendment but not a "criminal prosecution" under the Sixth Amendment); *see also Rothgery*, 554 U.S. at 222 (Thomas, J., dissenting).

The government's reliance on *Cruz v. New York*, 481 U.S. 186, 190 (1987), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 (2009), U.S. Br. 15, fails for the same reason. These cases discuss what it means to be a witness "against" a defendant for purposes of the Confrontation Clause. But these cases demonstrate that the word "against" simply requires that the witness's testimonial statement be incriminating. It does not follow that testimonial statements can be used "against" a defendant only at trial, as opposed to other parts of a criminal case. As the *Chavez* plurality recognized in the Fifth Amendment context, a person is compelled to be a "witness against himself" in violation of the Fifth Amendment so long as his statements are "admitted as testimony against him *in a criminal case*." 538 U.S. at 767 (emphasis added). Given Petitioner's and the government's concession that the probable cause hearing at issue here was part of Officer Vogt's criminal case, this Court need go no further to affirm the Tenth Circuit's answer to the question presented.

B. The purpose and history of the Self-Incrimination Clause confirm its protections extend to the probable cause hearing here.

1. This Court has long described the Fifth Amendment privilege as the "essential mainstay" of the

"American system of criminal prosecution," which is "accusatorial, not inquisitorial." *Malloy v. Hogan*, 378 U.S. 1, 7-8 (1964). "The essence of this basic constitutional principle is the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Mitchell v. United States*, 526 U.S. 314, 326 (1999) (emphasis and quotation marks omitted). The interests served by this provision include "[ensuring] that self-incriminating statements will [not] be elicited by inhumane treatment and abuses," a "sense of fair play," and a "distrust of self-deprecatory statements." *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964). "'[A] system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses' than a system relying on independent investigation." *Withrow v. Williams*, 507 U.S. 680, 692 (1993) (quoting *Michigan v. Tucker*, 417 U.S. 433, 448 n.23 (1974)).

The courtroom use of compelled testimony to demonstrate guilt at any point in a criminal case is plainly an affront to these principles. In arguing instead that the sole purpose of the Fifth Amendment is to prevent use of such statements at trial and sentencing, Petitioner and the government discuss at length the circumstances in which this Court has permitted witnesses to invoke the privilege outside or prior to a criminal case. Pet. Br. 12-16; U.S. Br. 12-14. Petitioner's first argument on this point—that "compelling someone to speak" in situations where the privilege is available does not alone "violate the Fifth

Amendment," Pet. Br. 13—is a non-sequitur. Officer Vogt has not claimed that an out-of-court invocation of the privilege or the pre-prosecution compulsion of testimonial statements, without more, completes a Fifth Amendment violation. The question is whether the probable cause hearing at issue here is itself part of the future prosecution—i.e., part of "the criminal case"—that invocation of the privilege is designed to protect.

On the actual question presented in this case, Petitioner and the government argue that the Self-Incrimination Clause prohibits uses of compelled testimony only in proceedings that ultimately determine guilt and punishment because those are the only stages in the criminal case where the testimony is "incriminating." *See* Pet. Br. 16 & n.10; U.S. Br. 10-14. Petitioner and the government distinguish incriminating uses of a compelled statement from situations where use of the statement could at most expose the speaker to "embarrassment, 'personal disgrace or opprobrium,'" Pet. Br. 16 (quoting *Brown v. Walker*, 161 U.S. 591, 605 (1896)) (internal quotation marks omitted), or other non-criminal consequences, U.S. Br. 14.

Of course, Officer Vogt has never argued that his compelled statements merit Fifth Amendment protection merely because their use by the government might embarrass him or produce some other harm short of criminal consequences. His statements receive Fifth Amendment protection because they are indeed incriminating: they could be used, and in fact were used, as evidence of his guilt in a criminal case. The very cases quoted by the government establish that a compelled statement is "incriminating," and

therefore inadmissible in a criminal case, so long as "the witness reasonably believes [those statements] could be used in a criminal prosecution or could lead to other evidence that might be so used." *Hiibel*, 542 at 189. The Fifth Amendment turns on "the nature of the statement or admission and the exposure which it invites" at the time the statement is made. *In re Gault*, 387 U.S. 1, 49 (1967).

In other words, it is the *risk* of criminal prosecution as a result of a compelled statement, not actual use to determine guilt or punishment, that makes the statement incriminating. *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (a statement is incriminating when it "might *tend to* subject to criminal responsibility him who gives it" (emphasis added)); *Hoffman v. United States*, 341 U.S. 479, 486 (1951) ("The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."). There is no sound basis for treating Officer Vogt's statements as non-incriminating; they went directly towards showing his guilt of the charged crime. *See* Pet. 14 (conceding the statements were incriminating).

Indeed, it is unclear why Petitioner and the government think it helps their cause to emphasize this Court's distinction between statements compelled when there is "no risk of future criminal liability" and situations where the use of "'the compelled testimony can ... lead to the infliction of criminal penalties.'" Pet. Br. 15, 17 (quoting *Kastigar*, 406 U.S at 461); *see* U.S. Br. 13 (the Fifth Amendment is concerned only

with "'testimony *leading to* the infliction of penalties affixed to the criminal acts'" (quoting *Ullmann v. United States*, 350 U.S. 422, 438-439 (1956) (emphasis added)). It may be that some pretrial uses of incriminating, compelled statements during a criminal case are so divorced from the ultimate determination of guilt and punishment as to warrant different treatment under the Fifth Amendment. *See* U.S. Br. 18 (proceedings to determine competency); Kansas Br. 5-8 (informal, nonadversarial hearings to determine probable cause for extending pretrial detention). But *the whole point* of the probable cause hearing against Officer Vogt was to determine whether there was sufficient evidence of his guilt for the prosecution to proceed. That probable cause hearing was a critical part of the criminal case against Officer Vogt and a necessary step the State had to take to continue prosecuting him, *see* Kan. Stat. § 22-2902(3)—a prosecution that was intended to culminate in a finding of criminal guilt and imposition of punishment against him. The government cannot seriously contend that the use of Officer Vogt's compelled statements to demonstrate the prosecution had sufficient evidence of his guilt to proceed to trial did "not expose [Officer Vogt] to the risk of conviction or punishment." U.S. Br. 11.

Disturbingly, by Petitioner's and the government's account, the prosecution could have forced Officer Vogt to take the stand to testify against himself at the probable cause hearing. The prosecution could have demanded he explain why he was guilty of the charged crime, and then the court could have relied on that explanation to allow the criminal case against Officer Vogt to proceed to trial. All of this would be fine, in their view, so long as the prosecution did not

then use the compelled statement again at Officer Vogt's trial or sentencing. Of course, as discussed further below, *infra* at 57-58, the prosecution would likely never face that conundrum given that the vast majority of defendants choose to enter a guilty plea rather than take the risk of going to trial.

It is hard to imagine a starker example than this of the prosecution "enlist[ing] the defendant as an instrument in his or her own condemnation." U.S. Br. 5, 12 (quoting *Mitchell*, 526 U.S. at 325). To allow the prosecutor to use compelled statements as evidence of guilt at this stage in a criminal case would result in precisely the "system of criminal law enforcement" this Court recognized in *Withrow* as antithetical to the Fifth Amendment: a system that "depend[s] on the 'confession'" rather than an "independent investigation." 507 U.S. at 692.

2. Historical practice confirms that the Framers intended the protections of the Fifth Amendment to apply to pretrial proceedings like Officer Vogt's probable cause hearing. Contrary to the government's argument that the Self-Incrimination Clause was a reaction only against using compelled testimony at trial, U.S. Br. 23, the Clause's origins reveal the Framers' intent to proscribe the examination of the accused under oath throughout the criminal case, including at pretrial proceedings to determine whether to bind over a defendant for trial.

Although the Fifth Amendment was designed to forestall attempts to return to the oath-based methods of criminal justice of the ecclesiastical and prerogative courts of the Star Chamber and High

Commission, John H. Langbein, *The Origins of Adversary Criminal Trial* 277-78 (2003); *see also Miranda v. Arizona*, 384 U.S. 436, 459-60 (1966), it also incorporated the self-incrimination privilege that developed in common law courts alongside these inquisitorial practices. 3 Joseph Story, *Commentaries on the Constitution* § 1782, at 660 (1833) (Fifth Amendment "is but an affirmance of a common law privilege"); Moglen, *supra*, at 1121; *Gecas*, 120 F.3d at 1454.

At common law, defendants had throughout the criminal process a right to refuse to provide self-incriminating testimony under oath. *See* Langbein, *supra*, at 278 ("At common law, the accused was not examined under oath."); Moglen, *supra*, at 1098-1100; Alschuler, *supra*, at 2650-51; *accord Doe*, 487 U.S. at 212. In fact, this freedom from questioning under oath—or under other forms of compulsion—was primarily a *pretrial* protection because defendants were not permitted to testify at trial, as a criminal defendant was thought to be inherently biased and therefore an unreliable witness. Langbein, *supra*, at 280; *see also Ferguson*, 365 U.S. at 574; Pet. App. 17a. In particular, the self-incrimination right played a central role in protecting defendants at the pretrial preliminary examination conducted by a justice of the peace. Alschuler, *supra*, at 2654-57; Moglen, *supra*, at 1098-99.

In that proceeding, a justice of the peace interrogated the accused felon and any witnesses about the charges brought by a citizen accuser in order to assist the "private prosecutor to build his case." Langbein, *supra*, at 43; *see also id* at 41-47; *see Gecas*, 120 F.3d

at 1452. Consistent with the common law privilege, however, the justice of the peace could not compel self-incriminating testimony—by oath, "physical force," or "threats of increased punishment"—and instead had to rely on the "force of argument" to obtain a voluntary confession. *See* Alschuler, *supra*, at 2650, 2653-54 & n.98, 2659; Moglen, *supra*, at 1098, 1103. Facing no compulsion, the defendant could decline to answer, and "doubtless would have suffered no more severe sanction than the drawing of an adverse inference." *See* Alschuler, *supra*, at 2653 & n.98.

As this history demonstrates, common law practice did not allow the use of the accused's compelled testimony at any point of the criminal case. Because the prosecution could not *compel* incriminating testimony from a defendant before or during the criminal case, the privilege guaranteed that compelled testimony could not be *used* at any point in the criminal case.

The government's contrary argument relies on academic discussions of cases where the justice of the peace accidentally put the defendant under oath and the court responded to the error by excluding the sworn evidence at trial. U.S. Br. 22; Langbein, *supra*, at 279-80; Alschuler, *supra*, at 2658-59. But the fact that the court excluded the evidence at trial does not establish, or even indicate, that the sworn testimony could be used elsewhere in the criminal process. Moreover, it is unsurprising the common law courts in these cases would focus on exclusion at trial, as opposed to any other use of compelled testimony. At that time, there were not the same opportunities for use of compelled testimony in pretrial proceedings, and so

the trial provided the primary proceeding where a defendant's statements might impermissibly be used. The pretrial preliminary examination that might produce compelled testimony would lead directly into a grand jury proceeding, which itself would take place "[a] day or so before trial." Langbein, *supra*, at 44-45.

Indeed, for at least some of the Framing-era history, the preliminary examination itself did not provide an opportunity for the use of a defendant's compelled statements. Through at least the eighteenth century, the justices of the peace did not adjudicate questions of guilt based on the testimony they uncovered from the accused at the preliminary hearing. Langbein, *supra*, at 44-45.[6] Justices of the peace could gather evidence but were "unable to resolve important matters in the pretrial" stage and in fact had "no power to dismiss felony charges for insufficiency of the evidence." Langbein, *supra*, at 44-47, 273-74; *see also Gecas*, 120 F.3d at 1442; *Conductor Generalis* 176. Because the justice of the peace could not evaluate these things, there would have been little reason for the government or prosecuting citizen to try to "use" a defendant's compelled statement.

But that does not mean that the use of such compelled testimony at a probable cause hearing would have been permissible had there been one. The historical development of the "modern privilege," U.S. Br.

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[6] The justice of the peace had authority to determine whether to authorize pretrial and pre-indictment release under bail, but that discretionary authority was limited, and in most cases the "Marian procedure presupposed the routine use of pretrial detention." Langbein, *supra*, at 48-49.

22-23, demonstrates the opposite. Toward the end of the eighteenth century and into the nineteenth century, preliminary examinations began to resemble something like the probable cause hearing at issue here. Magistrates would evaluate the sufficiency of the evidence and dismiss weak cases. Langbein, *supra*, at 45 n.177, 47 n.181, 273-277. As here, the preliminary hearing began to supplant some of the adjudicatory functions of the grand jury. *See* Langbein, *supra*, 45 n.177; *see id.* at 276 ("The magistrate's examination became the forerunner of the modern pretrial committal hearing."). Critically, and as the government admits, U.S. Br. 23, as these justices of the peace took on more of an adjudicatory role, they also provided additional protections to the defendants. For example, defendants had more freedom not to participate as witnesses (sworn or unsworn) at the preliminary hearing. Alschuler, *supra*, at 2660-61; Langbein, *supra*, at 276.

C. This Court's precedent confirms that the Self-Incrimination Clause applies to the probable cause hearing here.

Petitioner relies heavily on snippets of case law describing the Fifth Amendment as a "trial right." *See* Pet. Br. 9-15; *see also* U.S. Br. 16-19. Petitioner acknowledges that "[n]one of these statements ... was a holding on the precise question before the Court." Pet. Br. 9-10. Petitioner nonetheless goes on to overread those statements, violating its own admonition that "language in opinions must be viewed in the context of the case." Pet. Br. 24-25. Properly understood, those cases support only the notion that a Fifth

Amendment violation does not occur until the compelled statement is used in a criminal case. And Petitioner all but ignores this Court's cases recognizing that the prohibition on the use of compelled statements extends past trial to include sentencing and any use of the compelled statements that could lead to criminal penalties.

1. None of the cases quoted by Petitioner called upon the Court to consider the use of compelled testimony during criminal proceedings apart from a trial itself. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), provides a prime example. To determine when a Fourth Amendment violation occurs, the Court contrasted the Fourth Amendment with the Fifth Amendment, describing the privilege against self-incrimination as "a fundamental trial right of criminal defendants." *Id.* at 264. The Court added, "[a]lthough conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." *Id.* The Fourth Amendment's strictures, by contrast, apply "whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is fully accomplished at the time of an unreasonable governmental intrusion." *Id.* (internal quotation marks omitted).

Read in context, the term "trial right" in *Verdugo-Urquidez* was simply imprecise shorthand reflecting the distinction between Fourth Amendment violations, which are complete as soon as the government conducts an unreasonable search or seizure, and Fifth Amendment violations, which must be linked to a "criminal case." Had the Court's reference to "trial"

been changed to "criminal case," the reasoning and holding would have been the same.

It thus is unsurprising that several Justices have declined to rely on this language from *Verdugo-Urquidez* as a basis for concluding Fifth Amendment violations may occur only at trial. When the plurality in *Chavez* cited *Verdugo-Urquidez*, it was in support only of the proposition that the Fifth Amendment is not violated until the "use [of the compelled statement] in a criminal case." 538 U.S. at 767 (plurality opinion); *see also id.* at 792 (Kennedy, J., concurring in part and dissenting in part) (recognizing that "the extent of the right secured under the Self-Incrimination Clause was not ... before the Court" in *Verdugo-Urquidez*).

Petitioner's other cases use the "trial right" phraseology (and related formulations) to the same effect. In *Withrow*, 507 U.S. at 691-92, the Court again distinguished a Fourth Amendment violation, which is "completed" regardless of whether criminal charges are filed, from a Fifth Amendment violation, which the Court characterized a "trial right." And in *United States v. Patane*, 542 U.S. 630 (2004), the plurality described the Fifth Amendment as "primarily focuse[d] on the criminal trial" in explaining why the failure to give a *Miranda* warning does not by itself cause the Fifth Amendment to be violated. *Id.* at 637, 641-42. At no point did the plurality suggest a view on the implications of using compelled statements in a probable cause hearing.

Finally, Justice Marshall's dissent in *New York v. Quarles*, 467 U.S. 649, 686 (1984), likewise does not

implicate the question presented here. Justice Marshall's point was that the Fifth Amendment does not prohibit "emergency questioning" when the answers are never used in a criminal prosecution, even if that questioning does not adhere to the *Miranda* framework. He had no reason to consider whether the Fifth Amendment would be violated by use of the fruits of such questioning in a probable cause hearing. Indeed, it would be quite surprising if a dissent from the Court's decision to permit the use of an un-*Mirandized* statement at trial had been arguing that the Fifth Amendment's protections should apply *only* at trial.[7]

2. When directly confronted with questions about the scope of the Fifth Amendment's protections, this Court has repeatedly recognized the Fifth Amendment's protections are not limited to trial proceedings, squarely foreclosing Petitioner's theory that the dicta described above establish otherwise.

To begin with, this Court has twice held that the Self-Incrimination Clause applies to sentencing proceedings. *See Mitchell*, 526 U.S. at 327 (holding that Fifth Amendment's protection against compelled self-incrimination applies in "sentencing proceedings");

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[7] Petitioner stretches even further when it asserts that *Garrity* supports its position because the compelled statement at issue in that case was used at trial. Pet. Br. 25. Of course, the fact that the Fifth Amendment applies to trials says nothing about whether it also applies to a probable cause hearing. *Garrity* itself describes the Fifth Amendment as more broadly prohibiting the use of compelled statements "in subsequent criminal proceedings." 385 U.S. at 500.

Estelle v. Smith, 451 U.S. 454, 462-63 (1981) (compelled statements may not be used at the "penalty phase").[8] In reaching that conclusion, the Court recognized that the relevant question was whether those proceedings were part of the "criminal case." *Mitchell*, 526 U.S. at 327. The notion that the dicta in *Verdugo-Urquidez*, *Withrow*, and *Patane* establish the Clause applies only to trials is a non-starter for this reason alone.

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[8] The government highlights *Estelle*'s observation in dictum that if statements made in a psychiatric examination had been used only "for the limited, neutral purpose of determining his competency to stand trial," "no Fifth Amendment issue would have arisen." *Id.* at 465. That example bears no resemblance to the use of a compelled incriminating statement in a probable cause hearing as evidence that the defendant committed the charged crime. Indeed, the state-law pretrial mental examination statute at issue in *Estelle*, like its federal counterpart at the time, barred the use of findings from competency examinations "on the issue of guilt in any criminal proceeding." *Id.* at 463 n.6 (quoting Tex. Code Crim. Proc. Ann., Art. 46.02(g) (Vernon 1979)); 18 U.S.C. § 4244 (1976) (same).

The Federal Rules of Criminal Procedure likewise prohibit direct or derivative use of statements made by a defendant during a pretrial mental examination from being "admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant" has introduced certain types of evidence). Fed. R. Crim. P. 12.2(c)(4). As the Advisory Committee explained, under *Estelle*, "self-incrimination protections are not inevitably limited to the guilt phase of a trial," and "the privilege, when applicable, protects against use of defendant's statement and also the fruits thereof." *Id.* (1983 advisory committee's note).

The government responds to *Mitchell* and *Estelle* by adjusting its theory of the Fifth Amendment to encompass both the trial and sentencing phases of the criminal case, *see* U.S. Br. 5-6, 17-18; *see also* Pet. Br. 16 n.10, thereby proving Officer Vogt's point: *Verdugo-Urquidez*, *Withrow*, and *Patane* use the term "trial right" only as an imprecise reference to the Fifth Amendment's "criminal case" parameters, which Petitioner and the government concede include the probable cause hearing here. *See supra* at 18.[9]

Petitioner and the government also fail to meaningfully grapple with the Court's witness immunity cases, which confirm that pretrial uses of compelled testimony may violate the Fifth Amendment. In *Kastigar*, 406 U.S. at 449, the Court considered whether

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[9] Even if Petitioner were correct that this dicta establishes that a Fifth Amendment violation occurs only after use at trial, that would not end the inquiry. In other contexts, the Court has treated pretrial proceedings like Kansas's probable cause hearing as sufficiently trial-like to deserve protections reserved for trial. A defendant has a Sixth Amendment right to counsel at a trial-like probable cause hearing like the one here. *See Coleman v. Alabama*, 399 U.S. 1, 9 (1970); *Gerstein*, 420 U.S. at 122-23. The Court has also extended the Sixth and First Amendments' guarantee of a public trial to pretrial probable cause and suppression hearings. *See Press-Enterprise*, 478 U.S. at 12-13; *Waller v. Georgia*, 467 U.S. 39, 46-47 (1984). Although probable cause hearings "cannot result in the conviction of the accused," they are "sufficiently like a trial to justify" extending trial protections to them. *See Press-Enterprise*, 478 U.S. at 12. Indeed, proceedings like these are often the "only trial," *see Waller*, 467 U.S. at 46-47, and at the very least "the final and most important step in the criminal proceeding." *Press-Enterprise*, 478 U.S. at 12-13.

the federal immunity statute, which grants witnesses immunity from use and derivative use of their compelled testimony, provided a protection "coextensive with the scope of the [Fifth Amendment] privilege."[10] In explaining why the statute's protection is coextensive with the constitutional right, the Court left no doubt as to the right's breadth. When it offered examples of "possible incriminating uses of the compelled testimony," the Court did not confine itself to proceedings where ultimate guilt or punishment were at stake: prohibited uses can take place when "the prosecutor or other law enforcement officials may obtain leads, names of witnesses, or other information not otherwise available that might result in a prosecution." *Id.* at 459. In other words, prosecutors are barred from "using the compelled testimony in any respect" so as to "insure[] that the testimony cannot lead to the infliction of criminal penalties." *Id.* at 453; *see id.* at 460 (requiring a "total prohibition on use," including use of compelled testimony to obtain other evidence). In that way, the immunity conferred by the statute "leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege." *Id.* at 462.

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[10] The federal immunity statute provides that no compelled testimony "may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order" compelling the testimony. 18 U.S.C. § 6002. In other words, it sets forth an "explicit proscription of the use [of compelled testimony] in any criminal case." *Kastigar*, 406 U.S. at 453.

Petitioner concedes that *Kastigar* "could be read to say that the statutory grant of immunity would have direct application" outside of a criminal trial, Pet. Br. 17, but nonetheless maintains that *Kastigar*'s "context" shows that the Fifth Amendment's only concern is the use of such statements "at trial." Pet. Br. 17-18. As Petitioner and the government recognize (*id.*; U.S. Br. 11), however, *Kastigar* holds that the core purpose of the statute (and the Fifth Amendment) is to "assur[e] that the compelled testimony can in no way *lead to the infliction of criminal penalties.*" 406 U.S. at 461 (emphasis added).[11] Under that standard, the probable cause hearing here qualifies for the constitutional protection: the whole point of the hearing was to determine whether there was sufficient evidence of Officer Vogt's guilt to move forward with criminally prosecuting him.

That a grant of immunity has application outside of trial is confirmed by the Court's application of *Kastigar* in *Hubbell*, 530 U.S. at 30. The Court made clear that the government violates the prohibition on "use" of immunized testimony when it makes a pretrial derivative use of a witness's compelled testimony to

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[11] Petitioner is also wrong to suggest (Pet. Br. 18) that an earlier immunity case, *Murphy v. Waterfront Commission of N.Y. Harbor*, 378 U.S. 52, supports its "trial right" limitation. In stating that the Fifth Amendment prohibits the use of compelled statements "in a criminal trial," *id.* at 57 n.6, the Court did not hold that a trial was the *only* proceeding in which a violation could occur. Instead, the Court noted that the privilege protects state witnesses "against federal *prosecution*," such that a constitutionally valid immunity rule must preclude use of a state witness's compelled testimony "in connection with a [federal] criminal *prosecution* against him." *Id.* at 79 (emphasis added).

"prepare criminal charges against him." The Court required the dismissal of an indictment that had been obtained using "the testimonial aspect" of the witness's "act of producing subpoenaed documents." *Id.* at 42. Even though the government intended no use of that "testimonial aspect" at trial, dismissal was required because the government had "already made" a prohibited derivative use of the compelled evidence "in obtaining the indictment." *Id.* at 41. That use, in turn, supplied "the first step in a chain of evidence that led to [the] prosecution." *Id.* at 42. Because the government could not prove "that the evidence it used in obtaining the indictment and proposed to use at trial" came from independent sources, it could not save the indictment from dismissal. *Id.* at 45. That disposition, the Court explained, was required by the immunity statute and the "constitutional privilege" it embodies. *See id.* at 46.

The government entirely ignores *Hubbell*, and Petitioner's attempt to distinguish it makes no sense. Petitioner admits that the Court dismissed an indictment obtained through the prosecution's derivative use of compelled testimony in contravention of the immunity statute, but nonetheless suggests the Court's holding turned on the notion that the government "proposed to use" the tainted evidence at trial. Pet. Br. 18 n.11. But that proposed trial use does not change the fact that the government had *already* violated the immunity statute by making use of the compelled testimony to obtain the indictment. *See* 530 U.S. at 41, 45. And it is hard to understand why "proposed" use at trial (i.e., not actual use at trial) means that "the Court had no occasion to determine whether the Fifth

Amendment is actually violated by uses short of trial." Pet. Br. 18 n.11.

In short, there is simply no way to read *Kastigar* and *Hubbell*—and the broad protections they articulate against any use that may "lead" to criminal penalties—as conditioning Fifth Amendment violations on use in a proceeding that ultimately assesses guilt or punishment. Using a witness's compelled statement to obtain an indictment, *see Hubbell*, 530 U.S. at 45-46, or to establish probable cause to maintain a prosecution, exposes that witness to the risk of criminal punishment. Such pretrial uses of compelled testimony therefore go to the core of the Fifth Amendment's concern.

Finally, although the Court did not reach a majority opinion in *Chavez v. Martinez*, each of the separate opinions in that case undermines Petitioner's "trial right" theory. The issue in *Chavez* was whether police officers' use of severe compulsion to obtain incriminating statements violated the Fifth Amendment even though no criminal charges were ever filed against the declarant. *See* 538 U.S. at 764 (plurality opinion). In addressing this question, Justice Thomas, writing for a plurality, recognized that the operative term for identifying the parameters of the Fifth Amendment is "criminal case," explaining "it is not until [the] use [of compelled statements] in a criminal *case* that a violation of the Self-Incrimination Clause occurs." *Id.* at 767 (emphasis added). Other Justices likewise declined to treat the criminal *trial* as the touchstone of a Fifth Amendment violation. *See id.* at 777 (Souter, J., concurring in the judgment) ("the text of the Fifth Amendment ... focuses on *courtroom use*

of a criminal defendant's compelled, self-incriminating testimony" (emphasis added)); *id.* at 789 (Kennedy, J., concurring in part and dissenting in part) (describing Justices Thomas' and Souter's opinions as "conclud[ing] that a violation of the Self-Incrimination Clause does not arise until a privileged statement is introduced at some later criminal *proceeding*" (emphasis added)).

Each of those formulations is consistent with the Tenth Circuit's holding. Each reflects an interpretation of the Fifth Amendment's reference to a "criminal case" that belies Petitioner's suggestion that that term is irrelevant to the question presented here. And each contradicts Petitioner's notion that use of a witness's compelled statements at in-court adversarial proceedings that are part of a criminal case cannot constitute a Fifth Amendment violation.

Petitioner suggests that *Chavez* forecloses the possibility that "a Fifth Amendment violation can occur absent *any* courtroom use of the resulting statements," Pet. Br. 18, but that provides Petitioner no help here: Officer Vogt's probable cause hearing was indisputably an adversarial courtroom proceeding. Unlike in *Chavez*, where there was no such use (because there was no criminal case), the question presented here is whether the use of a defendant's compelled statement in the courtroom as evidence of his criminal guilt violates the Fifth Amendment. The constitutional text, purpose, and history, as well as this Court's precedent, answer yes.

D. Petitioner's arguments about grand jury proceedings do not support excluding from the Fifth Amendment's protections an in-court, adversarial probable cause hearing following the initiation of criminal charges against the defendant.

Unable to support its "trial right" limitation with constitutional text, precedent, or purpose, Petitioner changes the subject to grand juries. But this case does not involve grand jury proceedings, and as the government correctly notes (U.S. Br. 9 n.3), the Court need not consider the Clause's application in that context to affirm the decision below. In any event, Petitioner's concerns are wide of the mark.

Petitioner first asserts that extending the Self-Incrimination Clause's protections to a probable cause hearing "cannot be squared" with the protections this Court has extended to facially valid indictments issued by grand juries. Pet. Br. 19-20. Even accepting the premise that facially valid indictments generally cannot be challenged as founded on compelled testimony, *see* Pet. Br. 19, it does not follow that the Fifth Amendment protects uses of compelled testimony "only at trial." At most, that doctrine would shield pre-indictment uses of compelled statements from Fifth Amendment scrutiny. The absence of a "criminal prosecution" at the time the grand jury does its work explains why "certain constitutional protections," including some aspects of the Self-Incrimination Clause, "have no application before that body." *Williams*, 504 U.S. at 49. Indeed, a grand jury may

consider evidence without having "identif[ied] the offender it suspects, or even 'the precise nature of the offense' it is investigating." *Id.* at 48.

Further, given the grand jury's unique role and history, any special rule that eases the Fifth Amendment's constraints in grand jury proceedings need not apply identically to pretrial proceedings that take place in court after criminal charges are filed. "The grand jury's sources of information are widely drawn," *United States v. Calandra*, 414 U.S. 338, 344 (1974), and "the whole history of the grand jury institution" is one "in which laymen conduct their inquiries unfettered by technical rules," *Costello v. United States*, 350 U.S. 359, 364 (1956). It is against this backdrop that the Court has indicated "an indictment valid on its face" generally may not be challenged "on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." *Calandra*, 414 U.S. at 345. That backdrop, of course, is not common to all pretrial proceedings.

Petitioner contends that the same Fifth Amendment analysis must apply to grand jury proceedings and probable cause hearings because the latter type of hearing is not constitutionally required, and instead serves as an "alternative" to grand jury proceedings. Pet. Br. 21. But States are not excused from adherence to constitutional protections just because they adopt criminal procedures beyond the constitutional minimum. To take one example, "[t]he Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions," yet whatever appellate procedures a State chooses to pro-

vide must nonetheless comply with due process. *Halbert v. Michigan*, 545 U.S. 605, 610 (2005). And "in first appeals as of right, States must appoint counsel to represent indigent defendants." *See id.*

That same principle applies when States provide pretrial proceedings that are not themselves constitutionally mandated. Defendants in those proceedings still have constitutional rights that must be respected. *See* Wayne R. LaFave et al., *Criminal Procedure*, § 14.2(a) (4th ed. 2017) ("Though the constitution does not require that the defendant be afforded a preliminary hearing, once a jurisdiction provides for a preliminary hearing, it may not then restrict the defendant's right to that hearing in a manner that would violate constitutional protections." (citing, *e.g.*, *Coleman v. Alabama*, 399 U.S. 1 (1970)). Accordingly, a State's decision to incorporate probable cause proceedings into its criminal procedures does not excuse those proceedings from compliance with a defendant's Fifth Amendment rights.

II. Petitioner's Policy Concerns Do Not Justify Limiting The Fifth Amendment's Protections.

Petitioner and the government assert a variety of policy concerns about the purported consequences of the Tenth Circuit's holding for law enforcement procedures. Of course, this Court interprets the Constitution according to its meaning, not whether States or

the federal government will have to alter their practices as a result. In any event, Petitioner's and the government's asserted policy concerns are inapt.[12]

A. The Fifth Amendment accommodates governmental interests.

1. Petitioner urges the Court to read the Fifth Amendment narrowly because governments have a "vital and compelling interest in rooting out misconduct and discharging those who betray the public trust." Pet. Br. 26. But applying the Fifth Amendment to proceedings like Officer Vogt's probable cause hearing would not undermine that interest. There is no disagreement that Petitioner had authority to compel the information it wanted from Officer Vogt and that it could have relied on those compelled statements to discharge him. The question is whether the statement could later be used as evidence of Office Vogt's guilt at the probable cause hearing. Answering that question in the negative would not render Petitioner helpless to root out wrongdoing. To the contrary,

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[12] Petitioner's amici raise a handful of policy arguments that are outside the scope of the question presented. This case concerns the meaning of the Fifth Amendment; the Tenth Circuit did not consider the alternative § 1983 arguments advanced by the State and Local Government Employers, nor has Petitioner raised them. As we have explained, *supra* at 45-47. and as the government agrees, *see* U.S. Br. 9 n.3, this case does not require the Court to consider uses of compelled testimony in grand jury proceedings. And whatever rule the Court adopts in this case need not extend to *Gerstein* hearings, which serve a different purpose (determining probable cause to continue pretrial detention), do not require appointment of counsel, and must generally take place within 48 hours of arrest. *See* Kansas Br. 5-8.

government entities like Petitioner can and will continue to compel "information to 'assure the effective functioning of government.'" *Turley*, 414 U.S. at 81 (quoting *Murphy*, 378 U.S. at 93 (White, J., concurring)). The only "caution" Petitioner must heed, Pet. Br. 29, was put in place by this Court long ago: government employers cannot use compelled statements to trigger prosecution of a criminal case against the speaker.

In any event, the government's interest in rooting out wrongdoing is no reason to diminish the Fifth Amendment's protections. Even if a faithful application of the Fifth Amendment "adds to the burden of diligence and efficiency resting on enforcement authorities," this Court has not let that concern "seriously compromise an important constitutional liberty." *Hoffman*, 341 U.S. at 489-90. The imperative to safeguard individuals from compelled self-incrimination "transcend[s] any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime." *United States v. White*, 322 U.S. 694, 698 (1944).

2. In the years since this Court first determined that a government employer may not in subsequent "criminal proceedings" make use of statements that it "coerce[s]" from an employee "under threat of removal from office," *see Garrity*, 385 U.S. at 500, law enforcement agencies around the country have developed effective means of accommodating law enforcement interests and the Fifth Amendment. In one "best practices" guide designed for smaller police departments, for example, officers are advised that *Garrity* requires that they "immediately cease [their] administrative

inquiry and have someone else begin a criminal investigation" when a routine administrative investigation suggests possible criminal wrongdoing. Beau Thurnauer, *Internal Affairs: A Strategy for Smaller Departments*, Int'l Assoc. of Chiefs of Police 3-4 (undated), https://tinyurl.com/ybfdn57t. And none of the information obtained "can be shared with the criminal investigator." *See id.* at 4. Other departments elect to run completely separate criminal and administrative investigations or to have the administrative investigation follow the criminal investigation. *Id.* at 3.

The U.S. Department of Justice employs similar procedures when it investigates police officers for criminal wrongdoing following an internal affairs investigation by the local department. In order to comply with the protections given to statements generated during the internal investigation, the Department of Justice's review of internal affairs material will involve "personnel who are not involved in the investigation or prosecution ... redact[ing] privileged testimony before either the grand jury or the prosecuting attorneys see the statement." *In re Grand Jury Subpoena (Huntington Beach Police Officers Assoc.)*, 75 F.3d 446, 448 (9th Cir. 1996); *see also In re Grand Jury (John Doe)*, 478 F.3d 581, 583 (4th Cir. 2007); *In re Grand Jury Subpoena (Stover)*, 40 F.3d 1096, 1103 (10th Cir. 1994). And those investigating civil rights violations are directed not to review internal affairs statements but to instead forward them to the FBI in a sealed envelope so that any compelled statements can be removed before the materials are reviewed by the Department of Justice. U.S. Dep't of

Justice, *Civil Rights Resource Manual* No. 45 (3d ed. 2016).[13]

Had Petitioner followed well-known and established practices like these, it would have been free to investigate wrongdoing (and even precipitate criminal charges) without exposure to civil liability. Indeed, without much effort, a police department can also eliminate any confusion about whether its questioning of an employee serves an administrative or criminal purpose. When a government employer wants to elicit a statement that is free of the constraints of immunity, it can inform the person it is investigating that they are free not to answer the question. *E.g.*, Memorandum from Christopher A. Wray, Assistant Attorney General, to All Federal Prosecutors 2 (May 6, 2005) (describing *Garrity* warning), https://tinyurl.com/yb6c9fg2; *see also* Thurnauer, *supra*, at 3. That removes the compulsion while preserving the target's self-incrimination rights. *See, e.g.*, *United States v. Palmquist*, 712 F.3d 640, 644, 647 (1st Cir. 2013). If the government employer simply wants the information for an internal affairs investigation, it can provide expressly the immunity that *Garrity* requires. *See Kalkines v. United States*, 473 F.2d 1391, 1394 (Ct. Cl. 1973); *see also* Wray, *supra*, at 2-3.

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[13] Federal prosecutors maintain similar practices and are instructed to secure immunized testimony. U.S. Dep't of Justice, *Criminal Resource Manual* § 726. Moreover, the federal government will not authorize a prosecution when immunity has been given without first assuring itself that it can meet its burden under *Kastigar*. U.S. Dep't of Justice, *U.S. Attorney's Manual* §§ 9-23.210, 9-23.400.

So it is plain that uncertainty—about the quality of the evidence, whether it was compelled, or what prosecutors could do with that evidence—is not what leads a government employer like Petitioner to cause a Fifth Amendment violation. Instead, it is an alarming unwillingness to respect what the Fifth Amendment requires when governmental entities investigate their employees. The facts of this case are illustrative. The complaint allows no uncertainty about whether Officer Vogt's statements were compelled. Those statements were uttered in an internal affairs investigation where Officer Vogt was required to answer. Nonetheless, Petitioner made the deliberate and voluntary choice to inject those internal affairs statements and their fruits into the criminal process by passing them along to criminal investigators. Pet. App. 49a, 50a. At that moment, Petitioner exposed itself to the risk of a Fifth Amendment violation because, as even Petitioner admits, its actions triggered the distinct possibility that the statements would be used against Officer Vogt "at trial." Pet. Br. 27.

3. In practice, Petitioner's rule would hinder state and federal investigatory efforts because it would upset the well-settled expectations underlying the Fifth Amendment immunity doctrines that have "become part of our constitutional fabric." *Kastigar*, 406 U.S. at 447 (quoting *Ullmann*, 350 U.S. at 438).

If this Court were to rule for Petitioner, it would necessarily mean that "use and derivative use" immunity protects a defendant only at trial (and perhaps sentencing). But an immunity so limited is not particularly valuable to someone facing government

questioning and possible prosecution. If the choice is between losing one's job and giving compelled testimony that can be used to prosecute a criminal case against you all the way up until trial, the choice for many will be clear. And the incentive to be fully truthful after a grant of immunity drops precipitously if the individual retains such a significant prospect of criminal exposure. If the Fifth Amendment's protections exclude important pretrial proceedings like probable cause hearings, that would upset the "rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify." *Kastigar*, 406 U.S. at 446.

B. Courts can accommodate the Fifth Amendment.

Both Petitioner and the government argue that accepting the Tenth Circuit's rule would create difficulties for the courts (and prosecutors) because courts will not have an opportunity to weigh in on uncertain questions of compulsion before the prosecutors can decide whether to use those statements at a probable cause hearing. Pet. Br. 28-29; U.S. Br. 26-32. Petitioner argues that upholding the Tenth Circuit's decision would require adjustments of existing procedures and inhibit prosecutors from using arguably compelled testimony at the probable cause hearing. Pet. Br. 28-29; U.S. Br. 29 ("adjudication of suppression issues would thus fundamentally alter the nature of pretrial proceedings").

As the certiorari petition acknowledges (Pet. 7), however, application of the Fifth Amendment at pretrial hearings is the law of the land in at least four

circuits (Second, Seventh, Ninth, and Tenth), and there has been no sign that those proceedings have become unworkable for prosecutors in those parts of the country. But even if some jurisdictions' procedures would need modification to accommodate the Fifth Amendment's proper scope, that consequence would be unremarkable. The same was true when the Court determined in *Jackson v. Denno*, 378 U.S. 368 (1964), that a New York court could not present the issue of voluntariness of a confession to the jury, and the issue would instead have to be considered by the court in a pretrial hearing. *Id.* at 394. Similar adjustments were undertaken when this Court required Fourth Amendment probable cause determinations before a judicial officer "promptly after arrest." *Gerstein*, 420 U.S. at 125; *cf. Melendez-Diaz*, 557 U.S. at 325 ("The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience."). If current practice is out of sync with what the Constitution requires, the remedy is to change current practice.

That is not to say that every jurisdiction must follow a one-size-fits-all solution. "In some States, existing procedures may satisfy the [Fifth Amendment] requirement"; "[o]thers may require only minor adjustment." *Gerstein*, 420 U.S. at 124. But even though "[t]here is no single preferred pretrial procedure," *id.* at 123, it is essential that Fifth Amendment rights be respected throughout the criminal process.

In any event, Kansas itself provides an example of how state procedures can respect the Fifth Amendment right. Probable cause hearings in Kansas already allow for robust adversarial procedures. Kan. Stat. § 22-2902(3). Issues of suppression may be resolved at or before the hearing. *Id.* § 22-3215(6). In fact, some questions of admissibility *must* be answered at the hearing. *E.g.*, *id.* § 22-2902c ("court may admit into evidence an alleged controlled substance" when prosecution shows it has met certain criteria). If the only issue is that the hearings often take place promptly after charges are filed, that timing can be relaxed when "good cause" requires. *Id.* § 22-2902(2); *accord* Fed. R. Crim. P. 5.1(d) (a "magistrate judge may extend the time limits" with "defendant's consent and upon a showing of good cause"). Such a delay may be warranted if the entire prosecution turns on the ability to use the potentially compelled evidence. All of this is to say that existing procedures appear to already permit prompt pretrial resolution of Fifth Amendment questions.[14]

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[14] The government mischaracterizes Officer Vogt's argument as maintaining that any and every pretrial reference to compelled testimony in a criminal case violates the Fifth Amendment. *See* U.S. Br. 31-32. It is not Officer Vogt's position that a suppression hearing to filter out compelled statements would itself violate the Clause. That argument is circular since the point of a suppression hearing is to determine whether the statement is compelled and eligible for Fifth Amendment protection in the first place. Insofar as the statement is "used" during a suppression hearing, a judicial determination of whether the statement in question is "compelled" for Fifth Amendment purposes is not a use "against" a defendant.

Moreover, many courts have already determined the Fifth Amendment requires pretrial proceedings in cases where testimony has been immunized. Once someone shows he provided immunized statements, the government has "the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." *Kastigar*, 406 U.S. at 461-62; *Hubbell*, 530 U.S. at 45. That inquiry admits an equally time-consuming procedure, yet courts routinely hold so-called "*Kastigar* hearings" and a "pre-trial hearing is the most common choice." *United States v. North*, 910 F.2d 843, 854 (D.C. Cir.), *modified on reh'g*, 920 F.2d 940, 942 (D.C. Cir. 1990); *Stover*, 40 F.3d at 1104 (officer compelled "to provide an internal affairs statement" is entitled to "*Kastigar-style* hearing"). If courts are already being called upon to assess the effect of immunized testimony before trial, upholding the Tenth Circuit's rule will likely have little additional marginal effect.

In cases where continued prosecution depends on whether testimony is compelled, it benefits all involved to make that determination early in the case. That will best serve the preliminary hearing's important purpose: to "avoid both for the defendant and the public the expense of a public trial" and "to ... [ensure that] there are substantial grounds upon which a prosecution may be based." LaFave, *supra*, § 14.1(a) (quotation marks omitted; alterations in original).

C. Other constitutional protections are inadequate to safeguard defendants.

Even if the rules urged by Petitioner and the government would make things easier for prosecutors

and the courts, that regime would fail to offer criminal defendants adequate protections.

1. Petitioner's fallback remedy for improper use of compelled testimony at probable cause hearings—"exclusion of evidence at trial"—rings hollow for many defendants. Pet. Br. 30. The primary reason for the probable cause hearing is to give the defendant a chance to *avoid* trial. The prosecution's use of compelled statements at that proceeding deprives the defendant of Kansas's guarantee that he will not have to face trial unless the government has enough evidence.

Even if the probable cause hearing does not definitively establish guilt, it still comes with significant repercussions for the defendant. At the very least, accepting Petitioner's rule means that some defendants will face the risk of a trial and conviction in cases that never should have gotten past the probable cause hearing.

An unnecessary trial is daunting enough. But Petitioner's position also "ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). Just as with the Sixth Amendment right at issue in *Lafler*, the Self-Incrimination Clause "cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences." *Id.*; *see also Mitchell*, 526 U.S. at 325.

Given the ubiquity of plea bargaining, the probable cause hearing is for many defendants their only

real chance to challenge the basis for the charges against him. That hearing is "often the final and most important step in the criminal proceeding." *Press-Enterprise*, 478 U.S. at 12. If a defendant loses, the outcome is often a plea. *See id.* If this Court were to accept Petitioner's rule, defendants whose compelled statements are immunized will still have to choose between trial and a plea even though the prosecution should never have been entitled to go to trial in the first place.

At a minimum, exclusion of evidence at trial creates no "disincentive against governmental overreach." Pet. Br. 30. If anything, the opposite is true. Take, for example, a borderline case in which the prosecutor knows a defendant's compelled statements would not be admissible at trial. The prosecution may nonetheless be tempted to bring the case in the hope that it can extract a plea. If this Court determines that prosecutors can get past the preliminary hearing by relying on testimony that could never come in at trial, prosecutors will be all the more emboldened to bring questionable cases, and defendants will have no effective way to test the case against them at the preliminary hearing. Petitioner's rule does not allow defendants recourse under the Fifth Amendment but instead requires them to depend only "upon the integrity and good faith of the prosecuting authorities." *Kastigar*, 406 U.S. at 460.

2. Finally, Petitioner's reference to protections under the Fourth, Eighth, and Fourteenth Amendments misses the point. Officer Vogt is not complaining about the "misconduct that occurs in connection with an interrogation." Pet. Br. 30. Officer Vogt has

sufficiently alleged a violation of the Fifth Amendment based on the use of compelled statements, not the manner by which those statements were extracted. To be sure, some of the protections Petitioner identifies may prevent prosecutors from ever obtaining the evidence in the first place. But, assuming some forms of compulsion are consistent with the Fifth Amendment, *see Turley*, 414 U.S. at 78; *Kastigar*, 406 U.S. at 453; *Chavez*, 538 U.S. at 773, the Fifth Amendment protections against the use of such statements are still independently vital and necessary.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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No. 16–1495

In the Supreme Court of the United States

CITY OF HAYS, KANSAS, PETITIONER

v.

MATTHEW JACK DWIGHT VOGT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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TABLE OF CONTENTS

A. Vogt proposes no workable test for determining which pretrial uses violate the Self-Incrimination Clause 2

B. The grand jury analogy underscores the fundamental problems with the Tenth Circuit's ruling 8

C. Holding that the Self-Incrimination Clause can be violated by use during pretrial proceedings would cause severe problems..... 12

D. Vogt's remaining arguments do not warrant a different result 16

E. At minimum, the Court should hold that no *Garrity* violation can occur before trial 20

TABLE OF AUTHORITIES

Cases:

Best v. *City of Portland*, 554 F.3d 698 (7th Cir. 2009) 2

Chavez v. *Martinez*, 538 U.S. 760 (2003) 14, 20, 21

Coleman v. *Alabama*, 399 U.S. 1 (1970) 11

Counselman v. *Hitchcock*, 142 U.S. 547 (1892) 9

Crawford v. *Washington*, 541 U.S. 36 (2004) 3, 18

Cruz v. *New York*, 481 U.S. 186 (1987) 18

Digital Equip. Corp. v. *Desktop Direct, Inc.*, 511 U.S. 863 (1992) 7

Douglas v. *California*, 372 U.S. 353 (1963) 11

Estelle v. *Smith*, 451 U.S. 454 (1981) 3, 7

Garrity v. *New Jersey*, 385 U.S. 493 (1967) 14, 21

Gerstein v. *Pugh*, 420 U.S. 103 (1975) 5

Halbert v. *Michigan*, 545 U.S. 605 (2005) 11

Hiibbel v. *Sixth Judicial Dist. Ct.*, 542 U.S. 177 (2004) 17

Jackson v. *Denno*, 378 U.S. 368 (1968) 12

Kastigar v. *United States*, 406 U.S. 441 (1972) 10

Michigan v. *Bryant*, 562 U.S. 344 (2011) 18, 20

Michigan v. *Tucker*, 417 U.S. 433 (1974) 20

Miranda v. *Arizona*, 384 U.S. 436 (1966) 21

Pennsylvania v. *Ritchie*, 480 U.S. 39 (1987) 1

People v. *Melotik*, 561 N.W.2d 453 (Mich. Ct. App. 1997) 15

Press-Enterprise Co. v. *Superior Court of California*, 478 U.S. 1 (1986) 12

Rayyis v. *Superior Court*, 35 Cal. Rptr. 3d 12 (Cal. Ct. App. 2005) 15

State v. *Butler*, 897 P.2d 1007 (Kan. 1995)..... 4, 5, 8

State v. *Moats*, 457 N.W.2d 299 (Wis. 1990),..... 16

State v. *Zimmerman*, 660 P.2d 960 (Kan. 1983) 7

United States v. *Hubbell*, 530 U.S. 27 (2000) 17, 18

United States v. *North*, 910 F.2d 843 (D.C. Cir. 1990)..... 15

United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) 1, 10

Van Cauwenberghe v. *Biard*, 486 U.S. 517 (1988)..... 6

Waller v. *Georgia*, 467 U.S. 39 (1984)..... 12

Whorton v. *Bockting*, 549 U.S. 406 (2007) 18

Constitutional Provisions, Statutes and Rules:

U.S. Const. amend. V..... 10

Kan. Stat. Ann. § 22-2902(1) (2016)..... 5, 6

Kan. Stat. Ann. § 22-2902(3) (2016)..... 4, 5

Miscellaneous:

Albert W. Alschuler, *A Peculiar Privilege In Historical Perspective: The Right to Remain Silent*, 94 Mich. L. Rev. 2625 (1996) 19

Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Privilege Against Self-Incrimination*, 92 Mich. L. Rev. 1086 (1994) 19

John H. Langbein, *The Historical Origin of the Privilege Against Self-Incrimination At Common Law*, 92 Mich. L. Rev. 1047 (1994)..... 19

U.S. Attorneys' Manual: Principles of Federal Prosecution § 9-27.220..... 16

REPLY BRIEF FOR THE PETITIONER

Our position is straightforward. It is based in the constitutional text. And it has remained consistent throughout these proceedings. See Pet. Cert. Reply Br. 4 ("Our argument does not turn on when a 'criminal case' begins."). A person cannot be a "witness against" a criminal defendant until the stage where guilt and punishment are determined—that is, *at trial*. That is why this Court has described the Self-Incrimination Clause and the Confrontation Clause as "trial rights."[1] That is why defendants may not attack indictments by claiming that the grand jury violated either Clause and why the Confrontation Clause does not apply to constitutionally mandated bail hearings. Pet. Br. 19-22. And that is why there is no warrant for holding that the Self-Incrimination Clause is violated—and civil liability triggered—by use of allegedly compelled statements during pretrial hearings that are not constitutionally required and that are expressly designed to substitute for the very grand jury proceedings where the Fifth Amendment would pose no such bar.

Vogt's position, in contrast, is a moving target. According to Vogt, the Self-Incrimination Clause covers uses "at any point in the criminal case." Resp. Br. 10, 32. Except (maybe) not uses before a grand jury. *Id.* at 45. Or (probably) not during post-charge bail hearings. *Id.* at 29, 48 n.12. And (perhaps) not during proceedings held to determine the defendant's competency to stand trial. *Id.* at 29, 38 n.8. And definitely not during

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[1] *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) ("The privilege against self-incrimination * * * is a fundamental trial right of criminal defendants."); *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 52 (1987) (plurality opinion) ("The opinions of this Court show that the right to confrontation is a *trial* right[.]").

suppression hearings designed "to filter out [the] compelled statements themselves," *id.* at 55 n.14, but (maybe) during hearings held to determine the admissibility of other evidence, see *Best* v. *City of Portland*, 554 F.3d 698, 702-703 (7th Cir. 2009) (holding that plaintiff had stated claim based on use of compelled statements during a suppression hearing).

These hedges, caveats, and qualifications are necessary to prevent Vogt's proposed resolution of this case from too flagrantly violating this Court's precedent or practical realities. But they illustrate a deeper problem. To the extent Vogt proposes a clear rule that he attempts to ground in the constitutional text, that rule sweeps far beyond this case and creates consequences he is unwilling to accept. And when Vogt tries to limit the damage, his "rule" becomes increasingly ad hoc, jerry-rigged, and removed from the constitutional text and purpose.

A. Vogt proposes no workable test for determining which pretrial uses violate the Self-Incrimination Clause

1. Vogt's primary argument involves a reading of the constitutional text that cannot be squared with this Court's precedent or his own concessions about which pretrial uses the Fifth Amendment does and does not restrict. As Vogt points out, "[t]he Self-Incrimination Clause prohibits the government from 'compel[ing]' a person 'to be a witness against himself' 'in any criminal case.'" Resp. Br. 1. According to Vogt, a "criminal case" exists once formal proceedings have been initiated, *id.* at 16-18, and the sole function of the words "witness against himself" is to "describe[] the

type of evidence covered by the Clause," *id.* at 9, regardless of "how or when the prosecution later uses that statement," *id.* at 20.

As the Federal Government has already explained (U.S. Br. 18-19), that argument is inconsistent with *Estelle* v. *Smith*, 451 U.S. 454 (1981), which involved the constitutional restrictions on use of a defendant's statements from a court-ordered competency examination. The statements were compelled and testimonial, *id.* at 463-464, 468, and they were obtained and used after a criminal case had been commenced, *id.* at 456-457 (noting that the examination took place after the defendant was indicted). Yet the Court was clear that although use of the defendant's statements in one type of proceeding (a sentencing hearing to determine his future dangerousness) had violated the Self-Incrimination Clause, *id.* at 466, "no Fifth Amendment issue would have arisen" had the statements been used during a hearing held to "ensur[e] that [the defendant] understood the charges against him and was capable of assisting in his defense," *id.* at 465; see *id.* at 468. *Estelle* thus demonstrates that, contrary to Vogt's suggestions, the *exact same statements* may or may not trigger Self-Incrimination Clause concerns depending on "how or when the prosecution later uses" them, Resp. Br. 20. Cf. *Crawford* v. *Washington*, 541 U.S. 36, 60 n.9 (2004) (reaffirming that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted").

In fact, Vogt himself relies on a context- and purpose-based approach when attempting to avoid the untenable consequences of his own proposed rule. For example, Vogt argues that there is no constitutional

problem with using a compelled statement for purposes of determining the statement's admissibility at trial *because* "the point of a suppression hearing is to determine whether the statement is compelled and eligible for Fifth Amendment protection." Resp. Br. 55 n.14. Vogt makes the same move when discussing bail hearings and competency proceedings. *Id.* at 48 n.12 (referring to the "purpose" served by bail hearings); *id.* at 29 (discussing bail hearings and competency proceedings). We agree with Vogt that the context and purpose for which an allegedly compelled statement is being used matters for Fifth Amendment purposes. But, at that point, even Vogt has abandoned the idea that the "witness against himself" determination can be based *solely* "on the nature of the evidence given and the circumstances surrounding that person's statement at the time it is made." *Id.* at 20.

2. Although the precise formulations vary, Vogt suggests three more reasons why use of his allegedly compelled statements during the probable cause hearing violated the Fifth Amendment. The first rests on a mischaracterization of the nature of that hearing. The second and third have no basis in the constitutional text and are endlessly manipulable.

a. At times, Vogt suggests that the Self-Incrimination Clause was violated because the purpose of the probable cause hearing was to determine his guilt or innocence. See, *e.g.*, Resp. Br. 9 ("to demonstrate his criminal guilt"); *id.* at 28 ("showing his guilt of the charged crime"). That simply isn't so. Under Kansas law, "[a] preliminary hearing *is not* a trial of a defendant's guilt or innocence but rather an inquiry as to *whether* the defendant should be held for trial." *State* v. *Butler*, 897 P.2d 1007, 1020 (Kan. 1995) (emphases added); accord Kan. Stat. Ann. § 22-2902(3) (2016)

(framing issue as whether "there is probable cause to believe that a felony has been committed by the defendant"). The probable cause hearing thus "fulfills the function of a grand jury proceeding," *Butler*, 897 P.2d at 1007, for which it is an express statutory substitute, Kan. Stat. Ann. § 22-2902(1) (2016) (providing "a right to a preliminary examination before a magistrate, unless such charge has been issued as a result of an indictment by a grand jury").

b. Vogt's next argument is framed in the negative. Unlike certain other pretrial proceedings, Vogt suggests, probable cause hearings implicate the Fifth Amendment because they are not "so divorced from the ultimate determination of guilt and punishment as to warrant different treatment" than uses at trial. Resp. Br. 29.

There are several fatal problems with this argument. Vogt never explains how a "so divorced" test can be squared with his proposed interpretation of "criminal case" and "witness against." What is more, Vogt's own explanations only underscore the severe line-drawing problems that would be created by such a standard. For example, Vogt all but concedes that the Fifth Amendment does not apply to use of the defendant's statements at constitutionally mandated bail hearings. Resp. Br. 29, 48 n.12. But why not? The ultimate legal question is the same as at Kansas's probable cause hearing: whether there is "probable cause to believe the suspect has committed a crime." *Gerstein* v. *Pugh*, 420 U.S. 103, 120 (1975) (bail hearings); see Kan. Stat. Ann. § 22-2902(3) (2016) (probable cause hearing). True, the hearings may be governed by somewhat different procedural rules, Resp. Br. 48 n.12, and the consequences of an affirmative answer are somewhat different. But those differences have nothing to

do with the text of the Fifth Amendment nor with the *relationship* between the question to be decided at the hearing and "the ultimate determination of guilt and punishment." *Id.* at 29; cf. *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 527 (1988) (holding that even an order denying a motion to dismiss based on *forum non conveniens* was not "completely separate from the merits" for purposes of the collateral order doctrine).

c. At still other points, Vogt suggests that use of his statements violated the Self-Incrimination Clause because the probable cause hearing was "a necessary step the State had to take to continue prosecuting him," Resp. Br. 29, and thus gave Vogt "a chance to avoid trial in the first place," *id.* at 12.

That claim likewise cannot withstand scrutiny. For one thing, it depends on a very specific use of the word "necessary." Unlike the constitutionally mandated bail hearings at which Vogt seems to acknowledge that the Self-Incrimination Clause would have posed no bar to the use of his statements, the Federal Constitution did not require Kansas to conduct a preliminary hearing at all. Pet. Br. 20-21. Even under Kansas law, moreover, there is no right to a probable cause hearing where the defendant has been indicted by a grand jury. Kan. Stat. Ann. § 22-2902(1) (2016). In other words, neither the Federal Constitution nor Kansas law made the hearing "necessary" in the sense of being "essential."

A chance-to-avoid-trial test also proves far too much and is endlessly manipulable. A defendant who challenges his competency to stand trial has "a chance to avoid trial in the first place," Resp. Br. 12, but this Court has said that use of compelled statements during competency hearings does not violate the Self-In-

crimination Clause, *Estelle*, 451 U.S. at 465, 468. Defendants file suppression motions because they hope "to avoid trial in the first place," Resp. Br. 12, but Vogt disclaims any suggestion that the Clause is violated by use of allegedly compelled statements at suppression hearings, Resp. Br. 55 n.14. This Court has been careful to police against facile use of chance-to-avoid-trial reasoning in other contexts. See *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994) (observing that "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial'") (citation omitted). Similar vigilance is warranted here.

A chance-to-avoid-trial theory is particularly dubious here for two additional reasons, one involving Vogt's own inaction and the other involving Kansas law. As we and the Federal Government have pointed out, it appears that Vogt made no effort to prevent consideration of his allegedly compelled statements during the probable cause hearing, whether by filing a prehearing motion or objecting at the hearing itself. Pet. Br. 28; U.S. Br. 4 n.2. If the Fifth Amendment problem was compromising his chance to avoid a trial, it was at least partly of Vogt's own making.

The final problem with a chance-to-avoid-trial argument can be illustrated by imagining a counterfactual where the state trial court found probable cause and allowed the criminal case to proceed. Vogt could not have taken an immediate appeal, because in Kansas, like the federal system, criminal defendants are not permitted interlocutory appeals. *State* v. *Zimmerman*, 660 P.2d 960, 963 (Kan. 1983). So even if Vogt had objected to the use of his statements during the probable cause hearing or filed a motion to suppress

his statements after it—and even if such a claim had merit—Vogt still could have been faced with the choice "between trial and a plea" had the judge wrongly overruled Vogt's objection, "even though the prosecution should never have been entitled to go to trial in the first place." Resp. Br. 58.[2]

B. The grand jury analogy underscores the fundamental problems with the Tenth Circuit's ruling

Everyone agrees that "this case does not involve grand jury proceedings." Resp. Br. 45. And it is understandable why the Federal Government—which, unlike the States, is constitutionally required to prosecute via grand jury—would resist the comparison to minimize the risk of adverse impact on federal prosecutions. U.S. Br. 9 n.3. But the grand jury analogy is a telling one, and Vogt's inability to refute it underscores the weaknesses of his position.

1. To briefly restate the point: A criminal defendant may not attack an indictment by claiming that the grand jury considered his own previously compelled statements. The Federal Constitution permits States to use—or not use—grand juries as they see fit, and Kansas law specifically provides that the hearing that

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[2] Vogt could have challenged the conduct of his probable cause hearing via an appeal from a judgment of conviction. Even there, however, Kansas law provides that "where an accused has gone to trial and been found guilty beyond a reasonable doubt, any error at the preliminary hearing stage"—including consideration of inadmissible evidence—"is harmless unless it appears that the error caused prejudice at trial." *Butler*, 897 P.2d at 1021. Vogt thus seeks to impose Section 1983 liability against the City based on something that would not have supported relief even had he gone to trial.

occurred in this case is a substitute for and an alternative to proceeding via grand jury. The Federal Constitution also would permit Kansas to eliminate probable cause hearings entirely and leave criminal defendants with no opportunity to challenge the decision to prosecute. Pet. Br. 19-21.

2. Vogt disputes none of that. Instead, he suggests that the difference is that there is no "'criminal prosecution' at the time the grand jury does its work," that "the grand jury's unique role and history" explain why "the Fifth Amendment's constraints" are "ease[d]" in that context, and that there is no anomaly in saying that the Constitution imposes fewer restrictions on proceedings that are often constitutionally required (grand juries) than on proceedings that are never constitutionally required (probable cause hearings). Resp. Br. 45-47. None of these arguments withstands scrutiny.

a. The presence or absence of an ongoing "criminal prosecution" provides no basis for treating grand juries and probable cause hearings differently for Self-Incrimination Clause purposes. The reason is simple. The words "criminal prosecution" appear only in the Sixth Amendment, whereas both the Grand Jury Clause and the Self-Incrimination Clause are housed in the Fifth Amendment.

The Self-Incrimination Clause applies to "criminal case[s]." Vogt's whole argument, of course, is premised on the idea that probable cause hearings are part of a criminal case. But, as Vogt acknowledges, this Court has said that grand jury proceedings *also* "are part of a 'criminal case' under the Fifth Amendment." Resp. Br. 25 (citing *Counselman* v. *Hitchcock*, 142 U.S. 547, 563 (1892)). Although *Counselman* was overruled on

other grounds by *Kastigar* v. *United States*, 406 U.S. 441 (1972), its conclusion about the scope of "criminal case" has never been disavowed. Indeed, it is reinforced by the Fifth Amendment's clarification that there is no right to a grand jury "in *cases* arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." U.S. Const. amend. V (emphasis added). By underscoring that grand jury proceedings are *part* of the "criminal case," the constitutional text thus refutes any effort to distinguish between grand juries and probable cause hearings on that basis.

b. Vogt's assertion that "the grand jury's unique role and history" explain why this Court has "ease[d] the Fifth Amendment's constraints in grand jury proceedings," Resp. Br. 46, suffers from two problems. First, it assumes the answer to the question being asked by presupposing what the Self-Incrimination Clause would have required had it not been "ease[d]." Second, it amounts to nothing less than a suggestion that grand juries have a non-textual entitlement to violate the Self-Incrimination Clause. In contrast, any anomaly disappears once it is recognized that "[t]he privilege against self-incrimination * * * is a fundamental trial right" that can be violated "only at trial." *Verdugo-Urquidez*, 494 U.S. at 264.

c. Vogt is right that the Federal Constitution sometimes imposes restrictions on procedures that States are not required to create in the first place. Resp. Br. 46-47. But when the Constitution does so, it is for some reason. Other than simply repeating his assertions about what the Fifth Amendment requires of its own force, Vogt identifies no such reason here.

In fact, Vogt's own example undermines his argument. As Vogt notes, Resp. Br. 46-47, "[t]he Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions." *Halbert* v. *Michigan*, 545 U.S. 605, 610 (2005). But if States provide for such review, the Constitution requires them to "appoint counsel for an indigent defendant's first-tier appeal as of right." *Id.* at 611. The Court's decisions also explain why this is so: because of "both equal protection and due process concerns." *Id.* at 610 (internal citation omitted).

Here, in contrast, equality and fairness concerns cut against Vogt. In the appointment-of-counsel context, the salient distinction was between rich and poor defendants, and the Court's decisions acted to address an *existing* disparity. See *Douglas* v. *California*, 372 U.S. 353, 355 (1963) ("[T]here can be no equal justice where the kind of an appeal a man enjoys depends on the amount of money he has.") (internal quotation marks and citation omitted). But Vogt is asking this Court to hold that the Constitution requires *creating* a distinction between different categories of defendants (those who can take issue with use of allegedly compelled statements during pretrial proceedings and those who cannot) and to do so based on a distinction over which States have unfettered choice and the defendants themselves often have no control (whether a particular prosecution involves a grand jury or a probable cause hearing).[3]

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[3] The Court's decision in *Coleman* v. *Alabama*, 399 U.S. 1 (1970), Resp. Br. 47, reflects a different principle. The Sixth Amendment has long been construed to require counsel at all "critical stages" of the State's criminal process, including stages that are not constitutionally required. *Coleman*, 399 U.S. at 7-9 (plurality opinion) (giving examples). The Court's holding was

C. Holding that the Self-Incrimination Clause can be violated by use during pretrial proceedings would cause severe problems

The court below acknowledged that "[i]f the Fifth Amendment applies to pretrial proceedings," evidence that would be inadmissible at trial "would be considered inadmissible in pretrial proceedings as well." Pet. App. 19a. Such a holding would create severe problems.

1. For one thing, the City is not the gatekeeper of evidence on Fifth Amendment grounds. It is the court, not the parties or the witnesses, that determines whether evidence was obtained in a constitutional manner and the uses to which it may be put in further proceedings. Cf. *Jackson* v. *Denno*, 378 U.S. 368 (1968); note 5, *infra* (discussing *Kastigar* hearings). What is more, Vogt seeks to hold the City liable based on at least two decisions the City did not make: the state prosecutors, not the City, decided to proceed via probable cause hearing rather than via grand jury and to use Vogt's allegedly compelled statements at the probable cause hearing. Pet. Br. 27-29; State & Local Gov't Employers Amicus Br. 9, 12-14.

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thus based on a conclusion that the preliminary hearing at issue there was a "critical stage" for Sixth Amendment purposes. This case involves a different question: what uses of allegedly compelled statements make someone a "witness against himself" for purposes of the Self-Incrimination Clause.

Press-Enterprise Co. v. *Superior Court of California*, 478 U.S. 1 (1986), and *Waller* v. *Georgia*, 467 U.S. 39 (1984), Resp. Br. 39 n.9, are even further afield, because those cases implicated important public interests involving access to judicial proceedings. *Waller*, 467 U.S. at 46-47 (noting that the public-trial guarantee "ensure[s] that judge and prosecutor carry out their duties responsibly").

2. Vogt acknowledges that his position would require courts to resolve admissibility issues *before* conducting at least some types of pretrial proceedings. Resp. Br. 53-55. As the State amici explain, requiring that such decisions be made before bail hearings or during grand jury proceedings would be incompatible with the nature of those proceedings. Kansas Amicus Br. 5-11.

Even if the Court could identify some basis for limiting expansion of the Self-Incrimination Clause's restrictions to probable cause hearings alone, but see Section A, *supra*, such a holding would still cause significant problems. The Federal Government and many States currently *forbid* courts from adjudicating suppression issues during probable cause hearings, U.S. Br. 29; Kansas Amicus Br. 13 & n.5, so all of those rules would have to be flipped to *require* courts to do so. But the current rules are well-justified, because "requir[ing] courts to make complex determinations about the admissibility of a defendant's statements before resolving other preliminary issues" "would change the nature and purpose of pretrial proceedings," U.S. Br. 26, "either cause delays or would give the parties insufficient time to investigate and prepare" for those hearings, Kansas Amicus Br. 14 (quotation marks and citation omitted), and "raise difficult questions about what a defendant must do to preserve an argument that his statements were compelled," U.S. Br. 30.

3. Vogt's reassurances that there is no cause for alarm are unpersuasive.

a. Much of Vogt's argument rests on a bit of rhetorical sleight-of-hand, specifically blurring the distinction between what this Court must assume be-

cause of the procedural posture of this case and the actual situation confronting the City. The reason "[t]here is no dispute before this Court that Officer Vogt's statements were compelled by [the City] and implicated him in criminal conduct," Resp. Br. 1, is because the Court is reviewing a decision dismissing Vogt's complaint for failure to state a claim. The City, of course, did not have Vogt's complaint when it acted, nor was it required to view the facts in the light most favorable to him. Yet much of Vogt's argument is premised on the idea that the City *knew all along* that Vogt would later argue that his interactions with his former superiors gave rise to obligations under *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), and that the City should have avoided the whole problem by keeping the information about Vogt's possible criminal wrongdoing from the KBI. Resp. Br. 48-52. But, as we and our amici have explained, matters will rarely be so clear in the real world, which is why courts hold suppression hearings in the first place. Pet. Br. 26-27; U.S. Br. 27-28; Kansas Amicus Br. 67.[4]

b. Vogt asserts that "application of the Fifth Amendment at pretrial hearings is the law of the land in at least four circuits * * *, and there has been no sign that those proceedings have become unworkable for prosecutors in those parts of the country." Resp. Br.

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[4] Simply giving the information to the KBI could not itself have been a Fifth Amendment violation because, at that point, there was no "criminal case." See *Chavez* v. *Martinez*, 538 U.S. 760 (2003); Pet. Br. 18-19. This matter was nearly certain to be referred to the KBI in any event, because Vogt does not contend that the City compelled him to make his initial disclosures about the knife. And Vogt cites no authority for the proposition that the City was required to forgo even telling state officials that one of its police officers had been implicated in serious wrongdoing.

53-54. It would be more accurate to say that courts and litigants have yet to perceive the problem. The decisions comprising the Vogt-favoring side of the split were all civil cases decided within roughly the last decade, see Pet. 7-8, and we have been unable to locate any cases where a criminal defendant relied on one of those decisions to support a claim that the Federal Constitution barred use of allegedly compelled statements during pretrial proceedings or required overturning a conviction because such statements were improperly used during such proceedings. That will doubtlessly change if Vogt prevails before this Court.[5]

4. Vogt contends (Resp. Br. 29-30) that our position would permit the prosecution to require criminal defendants to take the witness stand at probable cause hearings and then use the resulting statements to support binding the defendant over for trial. Vogt identifies no case where prosecutors attempted such a maneuver.[6] (And, of course, Vogt's own approach would

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[5] Vogt is incorrect that "courts have already determined that the Fifth Amendment requires pretrial proceedings in cases where testimony has been immunized." Resp. Br. 56. Under current law, "a trial court may hold a *Kastigar* hearing pre-trial, post-trial, mid-trial (as evidence is offered), or it may employ some combination of these methods." *United States* v. *North*, 910 F.2d 843, 854 (D.C. Cir. 1990). Under Vogt's approach, these "time-consuming procedure[s]," Resp. Br. 56, often will need to occur far earlier and before other proceedings designed to take place immediately or soon after charges are filed.

[6] The decisions cited by NACDL (at 18), are not to the contrary. *Rayyis* v. *Superior Court*, 35 Cal. Rptr. 3d 12, 13-14 (Cal. Ct. App. 2005), involved "the 'corpus delicti' rule," under which "the fact that a crime has been committed * * * cannot be proved based solely on extrajudicial statements of the defendant." *People* v. *Melotik*, 561 N.W.2d 453, 455, 457 (Mich. Ct. App. 1997), and

permit such conduct before a grand jury, yet he provides no reason for believing there have been problems in that context either.)

The reason should be equally obvious: the strategy would be self-defeating. The defendant would be able to invoke the privilege against self-incrimination at the probable cause hearing and refuse to speak unless granted immunity. See Pet. Br. 12-15 (discussing the distinction between when the privilege against self-incrimination may be invoked and when the Fifth Amendment is actually violated). And any victory won at the probable cause hearing by granting the defendant immunity would almost certainly be a pyrrhic one, because the resulting statements would be inadmissible at trial and it seems unlikely that the prosecutors would be able to carry their burden of showing that none of their trial evidence was derived from the defendant's immunized statements. See *id.* at 16-18 (discussing immunity doctrines).[7]

D. Vogt's remaining arguments do not warrant a different result

1. Contrary to his repeated suggestions (Resp. Br. 20-24), the issue is not whether Vogt's statements

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State v. *Moats*, 457 N.W.2d 299, 302 (Wis. 1990), involved out-of-court statements obtained by police officers.

[7] Vogt's suggestion that this Court should act to prevent prosecutors from bringing cases where they *know* the "defendant's compelled statement would not be admissible at trial" solely in the "hope" of "extract[ing] a plea," Resp. Br. 58, ignores "[t]he presumption of regularity" and good faith accorded to those charged with enforcing the law. *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (citation omitted); see *U.S. Attorneys' Manual: Principles of Federal Prosecution* § 9–27.220 (instructing prosecutors to commence a case only if they "believe[] * * * that the admissible evidence will be sufficient to obtain and sustain a conviction").

were sufficiently testimonial to make him a "witness." True, the Court has used that word to describe people who participate in "any investigation," *id.* at 21 (citation omitted), including those questioned by police officers, Crim. Proc. Scholars Amicus Br. 18-19. But the Court has been equally clear that the Fifth Amendment cannot be violated absent some sort of courtroom use during a criminal proceeding. Pet. Br. 18-19. Accordingly, the key question is whether use of Vogt's statements at the probable cause hearing was, by itself, enough to render him "a witness *against himself.*"

2. Vogt claims "that a defendant becomes a 'witness against himself' when he makes 'incriminating communications . . . that are 'testimonial' in character.'" Resp. Br. 19 (quoting *United States* v. *Hubbell*, 530 U.S. 27, 34 (2000)). That is not what *Hubbell* says. The sentence from which Vogt quotes only in part makes clear that the Court was speaking (a) about the meaning of "witness" rather than "witness against himself," and (b) in terms of minimum requirements rather than comprehensive definitions. *Hubbell*, 530 U.S. at 34 ("The word 'witness' in the constitutional text limits the relevant category of compelled incriminating communications to those that are 'testimonial' in character."). And Vogt's claim that the *sole* function of the words "against himself" is to "require[] that the testimonial statements be incriminating" in some general sense is warranted by neither decision offered to support it. Resp. Br. 19-20 (citing *Hubbell*, 530 U.S. at 34, and *Hiibbel* v. *Sixth Judicial Dist. Ct.*, 542 U.S. 177, 189 (2004)).[8]

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[8] Although he claims that our discussion of *Hubbell* "makes no sense," Resp. Br. 42, Vogt cannot explain why the Court emphasized the government's inability to show "that the evidence it

This Court's decisions construing the similarly worded Confrontation Clause reinforce that one cannot "be a witness against [one]self" until the stage where guilt and punishment are determined. In *Crawford* v. *Washington*, 541 U.S. 36 (2004), for example, the Court noted that "[o]ne could plausibly read 'witnesses against' a defendant to mean those who actually testify at trial, those whose statements are offered at trial, or something in-between," *id.* at 42-43 (citation omitted), but gave no hint that one could be a "witness against" the defendant absent *any* use at trial. In *Cruz* v. *New York*, 481 U.S. 186 (1987), the Court stated that "[o]rdinarily, a witness is considered to be a witness 'against' a defendant for purposes of the Confrontation Clause *only* if his testimony is part of *the body of evidence that the jury may consider in assessing his guilt*," *id.* at 190 (emphases added)—that is, the evidence at trial. Accord *Michigan* v. *Bryant*, 562 U.S. 344, 358 (2011) (describing "the basic objective of the Confrontation Clause" as "prevent[ing] the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial"); *Whorton* v. *Bockting*, 549 U.S. 406, 413 (2007) (reiterating that the Confrontation Clause applies to "[t]estimonial statements of witnesses absent from trial") (citation omitted).

3. Vogt's argument from history also fails. We agree that "the Framers could not possibly have intended the phrase ['witness against himself'] to cover

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* * * proposed to use at trial was derived from legitimate [independent] sources." Pet. Br. 18 n.11 (quoting *Hubbell*, 530 U.S. at 45). On Vogt's view, that observation was irrelevant at best, and actively misleading at worst.

statements made by the defendant only at the trial itself." Resp. Br. 22. Like the Confrontation Clause, the Self-Incrimination Clause also covers at-trial use of a defendant's compelled pretrial statements. Pet. Br. 1, 9, 12-14. Where we disagree is whether a defendant has been made to be a "witness against himself" when he has *neither* been forced to take the witness stand at his own trial *nor* had his own previously compelled statements introduced against him at trial.

As the Federal Government explains, the purpose of the pretrial examinations Vogt discusses was to generate evidence that could later be used to prove the defendant's guilt at trial. U.S. Br. 19-24.[9] Vogt provides no evidence that the Fifth Amendment "was intended to guard against the use of a defendant's compelled statements for the limited purpose of determining whether the case should go forward upon a showing of probable cause after charges were filed, with no subsequent use of the statements at the guilt or penalty stage." U.S. Br. 23.

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[9] Vogt's sources agree. Albert W. Alschuler, *A Peculiar Privilege In Historical Perspective: The Right to Remain Silent*, 94 Mich. L. Rev. 2625, 2654 (1996) ("Until the mid-eighteenth century, the record of the defendant's pretrial examination was routinely read at her trial."); John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination At Common Law*, 92 Mich. L. Rev. 1047, 1061 (1994) ("Having impaled himself at pretrial, the criminal defendant would find that any supposed privilege against self-incrimination available at trial was worth little. If he declined to testify at trial, or attempted to recant upon his pretrial statement, the pretrial statement would be invoked against him at trial."); Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Privilege Against Self-Incrimination*, 92 Mich. L. Rev. 1086, 1098 (1994) ("All sources agreed" that the defendant's pretrial "confession, if any, was to be admissible against him at trial.").

Vogt's contrary claims miss the mark because they neglect the critical distinction between when the privilege against self-incrimination may be invoked and when the Fifth Amendment is actually violated. See Pet. Br. 12-15 (discussing this distinction). It is true that, at common law, a criminal defendant was barred from testifying at his own trial. Resp. Br. 22, 31. But that does not mean there was no way a defendant could be "a witness against himself" at such trials. Cf. *Bryant*, 562 U.S. at 357-358 (explaining that "[t]he basic purpose of the Confrontation Clause was to targe[t] the sort of abuses exemplified at the notorious treason trial of Sir Walter Raleigh," where an accuser's out-of-court statements were admitted against Raleigh at trial) (internal quotation marks & citation omitted). And that risk, in turn, explains why "defendants had throughout the criminal process a right to refuse to provide self-incriminating testimony under oath." Resp. Br. 31. Not because compulsion, standing alone, would render the defendant "a witness against himself." But rather because it was clear, then as now, "that an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage." *Michigan* v. *Tucker*, 417 U.S. 433, 440-441 (1974).

E. At minimum, the Court should hold that no *Garrity* violation can occur before trial

This case is a far cry from *Chavez* v. *Martinez*, 538 U.S. 760 (2003). There, the plaintiff was subject to intense police questioning while "screaming in pain" after being "shot in the face," and "[t]he officer made no effort to dispel the perception that medical treatment was being withheld until [the plaintiff] answered the questions put to him." *Id.* at 798 (Kennedy, J., concurring in part and dissenting in part).

Vogt cannot claim that he experienced "severe compulsion," *Chavez*, 538 U.S. at 799 (Ginsburg, J., concurring in part and dissenting in part), much less "torture or its close equivalents," *id.* at 789 (Kennedy, J., concurring in part and dissenting in part). Even crediting all allegations of the complaint, this case involves a police officer who notified his employer about his own misconduct and was then required, as a condition of his job (from which he had already decided to quit) to provide additional information about those same matters. Pet. App. 49a.

As we explained in our opening brief, "[e]ven if some types of Fifth Amendment violations could occur before trial, the Court should reject any such notion for * * * claims" like Vogt's. Pet. Br. 25 (citing *Garrity* v. *New Jersey*, 385 U.S. 493 (1967)). Such claims bear no resemblance to the types of abuses that motivated the Self-Incrimination Clause. What is more, the Constitution specifically *permits* a public employer to inform an employee that he will be fired unless he cooperates with an official investigation so long as it follows certain rules, and the appropriate time for determining whether those rules have been followed is at trial. Pet. Br. 25. Thus, as with *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Court should, at minimum, hold that no *Garrity* violation can occur short of trial. Cf. *Chavez*, 538 U.S. at 790 (Kennedy, J., concurring in part and dissenting in part) (stating that "[t]he identification of a *Miranda* violation and its consequences * * * ought to be determined at trial").

* * *

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 16-1495

In the Supreme Court of the United States

CITY OF HAYS, KANSAS, PETITIONER

v.

MATTHEW JACK DWIGHT VOGT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Fifth Amendment's Self-Incrimination Clause is violated when a compelled statement is used to assess probable cause at a preliminary hearing, but not to adjudicate guilt or punishment at a criminal trial.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Summary of argument 5
Argument:
The use of respondent's statements at a pretrial probable cause hearing did not violate the Self-Incrimination Clause 7
A. The Self-Incrimination Clause's text, interpreted in light of its purpose, focuses on the use of a defendant's statements to determine guilt or punishment 9
B. This Court's decisions confirm that incrimination prohibited by the Self-Incrimination Clause focuses on the use of a statement at the guilt or penalty phase of a criminal trial 16
C. Historical practice supports the conclusion that the Self-Incrimination Clause does not extend to uses of a statement in pretrial proceedings where guilt and punishment are not adjudicated 19
D. Extending the Self-Incrimination Clause to pretrial proceedings would have adverse consequences for the criminal process 26
E. The use of respondent's statements at a probable cause hearing did not constitute incrimination prohibited by the Self-Incrimination Clause 32
Conclusion 34

TABLE OF AUTHORITIES

Cases:	Page
Allen v. *Illinois*, 478 U.S. 364 (1986)	14, 33
Barber v. *Page*, 390 U.S. 719 (1968)	15, 32
Boyd v. *United States*, 116 U.S. 616 (1886)	11, 12
Brady v. *United States*, 397 U.S. 742 (1970)	8
Brinegar v. *United States*, 338 U.S. 160 (1949)	28, 33
Brown v. *Walker*, 161 U.S. 591 (1896)	13, 14
Chavez v. *Martinez*, 538 U.S. 760 (2003)	9, 17, 25
Coleman v. *Alabama*, 399 U.S. 1 (1970)	33
Counselman v. *Hitchcock*, 142 U.S. 547 (1892), overruled on other grounds, *Kastigar* v. *United States*, 406 U.S. 441 (1972)	9
Crawford v. *Washington*, 541 U.S. 36 (2004)	15
Cruz v. *New York*, 481 U.S. 186 (1987)	15
Culombe v. *Connecticut*, 367 U.S. 568 (1961)	8
Davis v. *United States*, 328 U.S. 582 (1946)	11
Dickerson v. *United States*, 530 U.S. 428 (2000)	27
Doe v. *United States*, 487 U.S. 201 (1988)	10, 22
Estelle v. *Smith*, 451 U.S. 454 (1981)	6, 8, 14, 17, 18, 19
Garrity v. *New Jersey*, 385 U.S. 493 (1967)	27
Gault, In re, 387 U.S. 1 (1967)	13
Gerstein v. *Pugh*, 420 U.S. 103 (1975)	15, 16, 28, 33
Giordenello v. *United States*, 357 U.S. 480 (1958)	29, 30
Gonzalez v. *United States*, 553 U.S. 242 (2008)	29
Hiibel v. *Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177 (2004)	10
Hoffman v. *United States*, 341 U.S. 479 (1951)	13
Kastigar v. *United States*, 406 U.S. 441 (1972)	11
Lawn v. *United States*, 355 U.S. 339 (1958)	10

Cases—Continued: Page

Lefkowitz v. *Turley*, 414 U.S. 70 (1973) 12
Malloy v. *Hogan*, 378 U.S. 1 (1964) 7, 12
McCarthy v. *Arndstein*, 266 U.S. 34 (1924) 13
Melendez-Diaz v. *Massachusetts*, 557 U.S. 305 (2009) 15
Michigan v. *Tucker*, 417 U.S. 433 (1974) 25
Miranda v. *Arizona*, 384 U.S. 436 (1966) 21
Mitchell v. *United States*, 526 U.S. 314 (1999) 5, 8, 11, 12
New York v. *Quarles*, 467 U.S. 649 (1984) 18
Pennsylvania v. *Ritchie*, 480 U.S. 39 (1987) 16
Piemonte v. *United States*, 367 U.S. 556 (1961) 14
Regina v. *Arnold*, (1838) 173 Eng. Rep. 645 (K.B.) 23
Rothgery v. *Gillespie Cnty.*, 554 U.S. 191 (2008) 9, 25
Schneckloth v. *Bustamonte*, 412 U.S. 218 (1973) 17, 27
State v. *Washington*, 268 P.3d 475 (Kan. 2012) 3
Stoot v. *City of Everett*, 582 F.3d 910 (9th Cir. 2009), cert. denied, 559 U.S. 1057 (2010) 31, 32
Ullmann v. *United States*, 350 U.S. 422 (1956) 11, 13, 14
United States v. *Balsys*, 524 U.S. 666 (1998) 12, 13, 25
United States v. *Blue*, 384 U.S. 251 (1966) 18
United States v. *Calandra*, 414 U.S. 338 (1974) 10
United States v. *Friedrick*, 842 F.2d 382 (D.C. Cir. 1988) 27
United States v. *Garcia*, 496 F.2d 670 (5th Cir. 1974), cert. denied, 420 U.S. 960 (1975) 31
United States v. *Gecas*, 120 F.3d 1419 (11th Cir. 1997), cert. denied, 524 U.S. 951 (1998) 20, 21, 24
United States v. *Hubbell*, 530 U.S. 27 (2000) 10, 12
United States v. *Patane*, 542 U.S. 630 (2004) 12, 17
United States v. *Salerno*, 481 U.S. 739 (1987) 33

Cases—Continued: Page

United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) 4, 6, 17, 25
Williams v. *New York*, 337 U.S. 241 (1949) 15
Withrow v. *Williams*, 507 U.S. 680 (1993) 17, 27

Constitution, statutes, and rules:

U.S. Const.:
Art. III, § 3, Cl. 1 (Treason Clause) 16
Amend. V ..... *passim*
Just Compensation Clause 26
Self-Incrimination Clause ..... *passim*
Amend. VI 9, 10, 14, 15, 25
Compulsory Process Clause 16
Confrontation Clause 5, 14, 15
Amend. XIV 7
Federal Magistrates Act, 28 U.S.C. 631 *et seq.* 28
28 U.S.C. 636(a)(2) 29
28 U.S.C. 636(b)(1)(A)-(C) 29
28 U.S.C. 636(b)(1)(A) 29
18 U.S.C. 3142(f) 28
42 U.S.C. 1983 ..... 3, 31
Kan. Stat. Ann. (Supp. 2016):
§ 22-2902(1) 2
§ 22-2902(2) 3, 30
§ 22-2902(3) 3, 32
An Act appointing an Order to Justices of Peace for the Bailement of Prisoners, 1554, 1 & 2 Phil. & M., c. 13 (Eng.) 20

Statutes and rules—Continued: Page

An Acte to take thexaminacõn of Prysoners suspected of Manslaughter or Felonye, 1555, 2 & 3 Phil. & M., c. 10 (Eng.) 21
Fed. R. Crim. P.:
Rule 5.1 29
Rule 5.1(a) 29
Rule 5.1(c) 30
Rule 5.1(e) 29
Fed. R. Evid.:
Rule 104(a) 31
Rule 1101(d)(1) 31
Rule 1101(d)(3) 28

Miscellaneous:

Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 Mich. L. Rev. 2625 (1996) 21, 22, 23, 24
R. H. Helmholz, *The Privilege and the* Ius Commune: *The Middle Ages to the Seventeenth Century, in* The Privilege against Self-Incrimination: Its Origins and Development (R. H. Helmholz et al. eds. 1997) 21
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John H. Langbein:
The Criminal Trial before the Lawyers, 45 U. Chi. L. Rev. 263 (1978) 22
The Historical Origins of the Privilege Against Self-Incrimination at Common Law, 92 Mich. L. Rev. 1047 (1994) 21, 22, 23, 24
The Origins of Adversary Criminal Trial (2003) 21

Miscellaneous—Continued: Page

Eben Moglen, *The Privilege in British North America: The Colonial Period to the Fifth Amendment in* The Privilege against Self-Incrimination: Its Origins and Development (R. H. Helmholz et al. eds. 1997) 22

2 Frederick Pollock & Frederic William Maitland, *The History of English Law: Before the Time of Edward I.* (2d ed. 1898) 20

John H. Wigmore:

8 *Evidence in Trials at Common Law* (John T. McNaughton rev. 1961) 11

The Privilege Against Self-Crimination; Its History, 15 Harv. L. Rev. 610 (1902) 24

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INTEREST OF THE UNITED STATES

This case involves whether the Fifth Amendment's Self-Incrimination Clause is violated when a compelled statement is used to assess probable cause at a preliminary hearing. The Court's resolution of that question will apply to similar claims in federal prosecutions. See Fed. R. Crim. P. 5.1 (providing in certain circumstances for a preliminary hearing to assess probable cause). Accordingly, the United States has a significant interest in the case.

STATEMENT

1. Respondent worked as a police officer for petitioner City of Hays. Pet. App. 48a. In 2013, respondent sought employment with a different police department. *Ibid.* As part of the application process, respondent disclosed that he had kept a knife he obtained through his work as a Hays police officer. *Ibid.*

Respondent received a job offer conditioned on his reporting his possession of the knife and returning it to the Hays police department. Pet. App. 48a-49a. Respondent complied by telling the Hays police chief about the knife. *Id.* at 49a. The police chief opened an internal investigation and directed respondent "to document the facts related to his possession of the knife." *Ibid.* Respondent "wrote a vague one-sentence report related to his possession of the knife" and gave two weeks' notice of his resignation. *Ibid.*

Respondent subsequently participated in an interview with a Hays police officer responsible for internal investigations. Pet. App. 49a. Respondent disclosed information about the "type of police call [he] was handling when he came into possession of the knife," which enabled the officer to locate an audio recording that shed further light on the incident. *Id.* at 50a. The investigation indicated that respondent obtained the knife while responding to a report that a vehicle with slashed tires had been vandalized. C.A. App. 60 n.1.

The police chief requested that the Kansas Bureau of Investigation initiate a criminal investigation of respondent. Pet. App. 50a. The other police department subsequently withdrew respondent's employment offer. *Ibid.*

2. In 2014, Kansas charged respondent with two felony counts related to his possession of the knife. Pet. App. 50a. Because respondent was not charged by grand jury indictment, he was entitled to a probable cause hearing under state law. See Kan. Stat. Ann. § 22-2902(1) (Supp. 2016).

Kansas law provides that a probable cause hearing generally "shall be held * * * within 14 days after the arrest or personal appearance of the defendant."

Kan. Stat. Ann. § 22-2902(2). At that preliminary hearing, if "it appears that a felony has been committed and there is probable cause to believe that a felony has been committed by the defendant, the magistrate shall order the defendant bound over to the district judge having jurisdiction to try the case; otherwise, the magistrate shall discharge the defendant." *Id.* § 22-2902(3). In determining whether probable cause exists, "the judge * * * must draw inferences favorable to the prosecution from the evidence presented and should not be concerned with sufficiency of the evidence to support a conviction." *State* v. *Washington*, 268 P.3d 475, 477 (Kan. 2012).

At respondent's hearing, his statements about the knife "were used to support probable cause." Pet. App. 20a n.17. The magistrate judge and a state district court judge nevertheless "determined that probable cause did not exist to bind [respondent] over for trial." *Id.* at 50a-51a. The criminal charges against respondent accordingly were dismissed. *Id.* at 3a.

3. Respondent then filed this suit against petitioner under 42 U.S.C. 1983.[1] Respondent alleged that he had been compelled to give statements about the knife "as a condition of his employment," Pet. App. 49a, and he contended that petitioner was responsible for a violation of the Self-Incrimination Clause based on the use of those statements at his probable cause hearing. *Id.* at 4a, 52a-

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[1] Respondent also sued the individual officers who questioned him and the city whose police department made him the conditional job offer. The district court granted those defendants' motions to dismiss, Pet. App. 44a, and the court of appeals affirmed, *id.* at 20a-26a. Those claims are not at issue here.

53a.[2] Petitioner moved to dismiss, arguing that respondent had not been "compelled to be a witness against himself in a criminal case" because his statements were not "admitted against him in a criminal trial." C.A. App. 61.

The district court granted petitioner's motion to dismiss. Pet. App. 35a-44a. Given the procedural posture, the court credited respondent's allegation that his statements were compelled, but the court concluded that no constitutional violation occurred because the statements "were never introduced against [respondent] at trial." *Id.* at 43a. The court relied on the statement in this Court's decision in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), "that a 'constitutional violation [of the right to be free from compelled self-incrimination] occurs only at trial.'" Pet. App. 43a (quoting *Verdugo-Urquidez*, 494 U.S. at 264).

4. a. The court of appeals reversed the dismissal of the claim against petitioner. Pet. App. 1a-34a. The court reasoned that the Self-Incrimination Clause protects "more than a trial right" because its text refers to a "criminal case," which "appears to encompass all of the proceedings involved in a 'criminal prosecution.'" *Id.* at 10a-11a. The court drew further support for that holding from the history surrounding the Self-Incrimination Clause's ratification. *Id.* at 14a-20a. Because the court "conclud[ed] that the phrase 'criminal case' includes probable cause hearings," *id.* at 5a, it held that respondent had "adequately pleaded a Fifth Amendment violation," *id.* at 20a.

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[2] Respondent's complaint did not allege that he objected to the introduction of his statements at the probable cause hearing. See Pet. App. 46a-54a.

b. Judge Hartz concurred to highlight four issues implicated by the facts of the case that he understood the majority not to address. Pet. App. 33a-34a.

SUMMARY OF ARGUMENT

The use of a compelled statement for the limited purpose of determining whether probable cause exists to bind a defendant over for trial does not violate the Self-Incrimination Clause.

A. The text of the Self-Incrimination Clause, interpreted in light of its purpose, prohibits reliance on a criminal defendant's compelled statements to convict or punish him. Such use "compel[s]" the defendant "to be a witness against himself" in a criminal case. U.S. Const. Amend. V. But a defendant does not stand as "a witness against himself" when his statements are used for other purposes in pretrial proceedings, such as to determine whether he is competent to stand trial or whether probable cause exists for the case to proceed. Those proceedings may remove procedural barriers to further prosecution, but they do not "enlist the defendant as an instrument in his or her own condemnation" because they do not resolve the ultimate questions of guilt and punishment. *Mitchell* v. *United States*, 526 U.S. 314, 325 (1999).

The scope of the Fifth Amendment privilege—which protects a right to remain silent when incrimination is at issue, but not to avoid other unwanted consequences—demonstrates that the Self-Incrimination Clause focuses on exposure to criminal penalties, rather than procedural steps in a case apart from conviction and punishment. And this Court's interpretation of the Confrontation Clause, which uses the same phrase "witness against" to grant only a trial right, reinforces that conclusion: a defendant has not been compelled to

be a witness against himself when his statements are used solely at a pretrial proceeding, where the determination of his guilt and punishment are not at stake.

B. This Court's decisions support the conclusion that the use of a defendant's statements at a probable cause hearing does not implicate the Self-Incrimination Clause's protection. The Court has stated that "[a]lthough conduct by law enforcement officials prior to trial may ultimately impair [the Fifth Amendment] right, a constitutional violation occurs only at trial." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990). And the Court has approved the use of a defendant's compelled statements to determine his competency to stand trial, so long as the statements are not also used at the guilt or penalty phases of the case. See *Estelle* v. *Smith*, 451 U.S. 454, 465, 468-469 (1981). The consequence of being found competent, like the effect of a finding of probable cause, is that the criminal prosecution can proceed. But neither pretrial proceeding adjudicates criminal guilt or punishment—and so in neither proceeding does the use of a defendant's compelled statements violate the Self-Incrimination Clause.

C. Historical practice confirms that the Self-Incrimination Clause guards against using a defendant's statements to convict or punish him. From the medieval period until the 17th Century, suspects in England and continental Europe were routinely required to incriminate themselves, with coerced confessions introduced to determine the defendant's guilt and penalty. Under the inquisitorial system of justice employed in common-law and ecclesiastic courts, defendants were placed under oath, forced to confess their crimes, and convicted and punished on that basis. Those repressive practices prompted recognition of a privilege against self-

incrimination at America's Founding. But nothing in the historical record indicates that the Framers intended the Self-Incrimination Clause to extend beyond the principal evil that inspired its adoption—the use of a defendant's compelled testimony to determine his criminal responsibility.

D. Extending the Self-Incrimination Clause to pretrial hearings would fundamentally alter the nature and purpose of those proceedings. Courts would be required to adjudicate complicated and fact-intensive suppression questions before resolving other preliminary issues in a case, creating a host of practical problems about when suppression objections must be raised, which factfinders—magistrates or courts—have authority to adjudicate those objections, and how quickly other pretrial issues such as probable cause assessments and bail determinations can be resolved. The Self-Incrimination Clause does not mandate that disruption of the criminal process.

E. Because respondent's statements were used only to assess probable cause in a preliminary hearing, no Self-Incrimination Clause violation occurred in this case. The Clause protects against the use of a statement to convict or punish—not against the use of a statement to determine whether a trial should even occur.

ARGUMENT

THE USE OF RESPONDENT'S STATEMENTS AT A PRETRIAL PROBABLE CAUSE HEARING DID NOT VIOLATE THE SELF-INCRIMINATION CLAUSE

The Fifth Amendment's Self-Incrimination Clause, applicable to the States through the Fourteenth Amendment, see *Malloy* v. *Hogan*, 378 U.S. 1, 6 (1964), provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const.

Amend. V. As this Court has long recognized, "[t]he essence of this basic constitutional principle is 'the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.'" *Estelle* v. *Smith*, 451 U.S. 454, 462 (1981) (emphasis omitted) (quoting *Culombe* v. *Connecticut*, 367 U.S. 568, 581-582 (1961)).

That purpose defines the Self-Incrimination Clause's protection once criminal charges have been filed. To ensure that a criminal defendant is not "enlist[ed] * * * as an instrument in his or her own condemnation," the Clause protects against the use of a defendant's compelled statements to establish guilt or to inflict criminal penalties. *Mitchell* v. *United States*, 526 U.S. 314, 325 (1999). Those uses of a defendant's testimonial statements conscript him to "stand[] as a witness against himself." *Brady* v. *United States*, 397 U.S. 742, 748 (1970).

No similar incrimination occurs when a defendant's statements are used for other purposes in pretrial proceedings, such as to determine whether the defendant is competent to stand trial, whether evidence should be suppressed, whether and in what amount bail should be set, or whether probable cause exists to bind the defendant over for trial. The Self-Incrimination Clause's text, purpose, and history demonstrate that no constitutional violation occurs when a defendant's statements are used solely for those limited purposes and not to prove his guilt or fix his punishment.

A. The Self-Incrimination Clause's Text, Interpreted In Light Of Its Purpose, Focuses On The Use Of A Defendant's Statements To Determine Guilt Or Punishment

The Self-Incrimination Clause bars using a defendant's compelled statements to render him "a witness against himself" in "any criminal case." U.S. Const. Amend. V. Although this Court has "not decide[d] * * * the precise moment when a 'criminal case' commences," *Chavez* v. *Martinez*, 538 U.S. 760, 767 (2003) (plurality opinion), the court of appeals concluded that such a case includes pretrial proceedings that occur after formal charges have been filed against the defendant. See Pet. App. 10a-20a; cf. *Rothgery* v. *Gillespie Cnty.*, 554 U.S. 191, 198 (2008) (observing that the Sixth Amendment right to counsel in "all criminal prosecutions" attaches at "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment") (citations and internal quotation marks omitted).[3]

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[3] Because the court of appeals considered only whether the Self-Incrimination Clause bars the use of a compelled statement in a post-charge probable cause hearing, this case provides no opportunity to consider whether the Clause prohibits the use of such a statement to charge a defendant in the first place, either in grand jury proceedings or in a complaint or information. Resolving that question would require consideration of whether the historical abuses addressed by the Self-Incrimination Clause included formally transforming a suspect into an "accused," even if the defendant's statements were not later used to determine guilt or punishment. A further question would arise whether grand jury proceedings and charging instruments are part of the "criminal case" contemplated by the Self-Incrimination Clause. Cf. *Counselman* v. *Hitchcock*, 142 U.S. 547, 562 (1892) (concluding that the possibility that a grand jury witness's testimony could expose him to criminal penalties meant that "[t]he case before the grand jury was * * * a

But the court of appeals did not go on to consider what uses of a defendant's statements within a criminal case render him a "witness against himself" within the meaning of the Self-Incrimination Clause. That text, construed in light of the Clause's purpose, focuses on the use of a defendant's statements to convict or punish him—neither of which occurs at a pretrial probable cause hearing.

1. A Self-Incrimination Clause violation occurs only by the use of a statement that is "testimonial, incriminating, and compelled," *Hiibel* v. *Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 189 (2004)—that is, use that "compel[s]" the criminal defendant "to be a witness against himself." U.S. Const. Amend. V. A defendant qualifies as a "witness" when he provides evidence that is "'testimonial' in character." *United States* v. *Hubbell*, 530 U.S. 27, 34 (2000); see *id.* at 50 (Thomas, J., concurring) (interpreting "witness" to mean a person who "gives or furnishes evidence"). But the defendant is only a witness "against himself" when that testimonial evidence is incriminating. See *Doe* v. *United States*, 487 U.S. 201, 208 n.6 (1988) (observing that "the requirement that the compelled communication be 'testimonial'" should not be confused with "the separate requirement that the communication be 'incriminating'").

Incrimination focuses on proof of facts that will establish a defendant's criminal responsibility—his guilt

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criminal case" in which the privilege to remain silent could be invoked), overruled on other grounds, *Kastigar* v. *United States*, 406 U.S. 441 (1972). It would also be necessary to evaluate decisions concluding that a defendant may not challenge an indictment on the ground that the grand jury considered compelled statements that would violate the Self-Incrimination Clause if used to convict or punish. See, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338, 345-346 (1974); *Lawn* v. *United States*, 355 U.S. 339, 348-350 (1958).

and his punishment. See 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2279, at 481 (John T. McNaughton rev. 1961) ("Legal criminality consists in liability to the law's punishment."). Thus, the risk of incrimination ceases, as does the Fifth Amendment privilege, when "the sentence has been fixed and the judgment of conviction has become final." *Mitchell*, 526 U.S. at 326. And incrimination does not occur at all in pretrial proceedings because those proceedings do not adjudicate guilt or punishment. Ascertaining probable cause, assessing competence, setting bail, and suppressing or admitting evidence *in limine* are important preliminary issues to resolve in a criminal prosecution. But those proceedings do not expose a defendant to the risk of conviction or punishment—and reliance on his statements for those limited purposes accordingly does not make him a "witness against himself."

That interpretation reflects the core purpose of the Self-Incrimination Clause. See, *e.g.*, *Davis* v. *United States*, 328 U.S. 582, 608 (1946) (the "language of the Amendment has been consistently construed in the light of its object"). This Court has long recognized that the Clause's "sole concern is to afford protection against being 'forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts.'" *Kastigar* v. *United States*, 406 U.S. 441, 453 (1972) (quoting *Ullmann* v. *United States*, 350 U.S. 422, 438-439 (1956), in turn quoting *Boyd* v. *United States*, 116 U.S. 616, 634 (1886)) (some internal quotation marks omitted). "Although the Clause serves a variety of interests in one degree or another, * * * at its heart lies the principle that the courts of a government from which a witness may reasonably fear prosecution may not in fairness compel the witness to furnish testimonial evidence that

may be used to prove his guilt." *United States* v. *Balsys*, 524 U.S. 666, 682-683 (1998).

As this Court has emphasized, "any compulsory discovery by extorting the party's oath * * * to convict him of crime * * * is contrary to the principles of a free government." *Boyd*, 116 U.S. at 631-632. Because "the American system of criminal prosecution is accusatorial, not inquisitorial," prosecutors must "establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." *Malloy*, 378 U.S. at 7-8. The Self-Incrimination Clause's "central purpose" is thus "to protect a defendant from being the unwilling instrument of his or her own condemnation." *Mitchell*, 526 U.S. at 329.

That principle makes clear that the Self-Incrimination Clause does not bar all use of statements in any stage within a criminal case, but only in those proceedings that adjudicate guilt or affix punishment. Because a preliminary hearing does neither, no constitutional violation occurs by the use of a statement solely to assess probable cause to bind a defendant over for trial.

2. The scope of the Fifth Amendment privilege to remain silent reinforces the Self-Incrimination Clause's focus on guilt and punishment. Although the Clause's "text * * * suggests that 'its coverage [is limited to] compelled testimony that is used against the defendant in the trial itself,'" *United States* v. *Patane*, 542 U.S. 630, 638 (2004) (plurality opinion) (quoting *Hubbell*, 530 U.S. at 37) (brackets in original), an individual can invoke the *privilege* "in any * * * proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz* v. *Turley*, 414 U.S. 70, 77 (1973). As this Court has explained, "the availability of the privilege does not turn

upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *In re Gault*, 387 U.S. 1, 29 (1967).

The limits on a person's ability to invoke the Fifth Amendment privilege illustrate that proof of guilt and punishment is the central focus of prohibited incrimination. To claim protection under the Self-Incrimination Clause, a person's testimony must "tend to subject [him] to criminal responsibility." *McCarthy* v. *Arndstein*, 266 U.S. 34, 40 (1924). Thus, if a person's testimonial statements do not supply "links in a chain of facts imperiling [him] with conviction," he cannot invoke a right to remain silent. *Hoffman* v. *United States*, 341 U.S. 479, 488 (1951). Similarly, if the individual faces no threat of criminal penalties—for example, because double jeopardy protections apply, the statute of limitations has run, or he has been pardoned—the privilege does not shelter him from answering even those questions that could expose his guilt. See, *e.g.*, *Brown* v. *Walker*, 161 U.S. 591, 598-599, 603-604 (1896). And this Court has rejected constitutional challenges to immunity statutes that override the privilege because the Self-Incrimination Clause's "sole concern is, as its name indicates, with the danger to a witness forced to give testimony leading to the infliction of 'penalties affixed to the criminal acts,'" and "[i]mmunity displaces the danger." *Ullmann*, 350 U.S. at 438-439 (citation omitted); see *Balsys*, 524 U.S. at 692 ("If the Government is ready to provide the requisite use and derivative use immunity, * * * the protection goes no further: no violation of personality is recognized and no claim of privilege will avail.").

Similarly, an individual cannot claim a Fifth Amendment privilege to avoid adverse consequences apart from guilt and punishment in a criminal case. Because "[t]he design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge," the Fifth Amendment does not "shield the witness from * * * personal disgrace or opprobrium." *Brown*, 161 U.S. at 605-606; see *Ullmann*, 350 U.S. at 430-431. A defendant is not relieved from being compelled to testify based on a fear for his or his family members' lives. See *Piemonte* v. *United States*, 367 U.S. 556, 559 n.2 (1961). He cannot invoke a privilege against answering questions in a psychiatric exam that will determine his competency to stand trial. See *Estelle*, 451 U.S. at 468-469. And he cannot claim the privilege in a proceeding to classify him as a sexually dangerous person for the purpose of imposing civil confinement, even though his liberty interest is at stake. *Allen* v. *Illinois*, 478 U.S. 364, 370, 372 (1986). In each of those circumstances, an individual's testimony can produce outcomes he wishes to avoid—but because his statements will not be used to adjudicate his criminal guilt or punishment, he is not compelled to incriminate himself within the meaning of the Self-Incrimination Clause.

3. That understanding of the Self-Incrimination Clause's scope draws additional force from this Court's interpretation of the Sixth Amendment's Confrontation Clause, which uses similar language in providing that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the *witnesses against him*." U.S. Const. Amend. VI (emphasis

added). "Ordinarily, a witness is considered to be a witness 'against' a defendant for purposes of the Confrontation Clause," this Court has explained, "only if his testimony is part of the body of evidence that the jury may consider in assessing his guilt." *Cruz* v. *New York*, 481 U.S. 186, 190 (1987); see *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 313 (2009) (observing that a drug analyst "certainly provided testimony *against* [the defendant]" by "proving one fact necessary for his conviction").

In line with that understanding of being a "witness against," the Court has repeatedly emphasized that "[t]he right to confrontation is basically a trial right." *Barber* v. *Page*, 390 U.S. 719, 725 (1968); see, *e.g.*, *Crawford* v. *Washington*, 541 U.S. 36, 42-43 (2004) ("One could plausibly read 'witnesses against' a defendant to mean those who actually testify at trial, * * * those whose statements are offered at trial, * * * or something in between.") (citations omitted).[4] An accused accordingly has no constitutional right to confront witnesses who provide adverse testimony in pretrial proceedings like probable cause hearings. See *Gerstein* v.

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[4] The Confrontation Clause's scope is narrower than the Self-Incrimination Clause insofar as it does not apply at sentencing. See, *e.g.*, *Williams* v. *New York*, 337 U.S. 241, 246 (1949). That contrast reflects the history and purpose of these guarantees. Sentencing courts traditionally relied on a wide range of information, including hearsay, to impose punishment, *ibid.* while the abuses that the Self-Incrimination Clause was designed to redress included using a defendant's compelled statements to impose punishment, see pp. 19-23, *infra*. But nothing in the historical record suggests that either the Confrontation Clause or the Self-Incrimination Clause was intended to apply to pretrial proceedings that did not involve issues of guilt or punishment. For Fifth and Sixth Amendment purposes, those proceedings do not involve "witness[es] against" the accused.

Pugh, 420 U.S. 103, 121-122 (1975). A parallel understanding applies to the Self-Incrimination Clause: a person is not, for constitutional purposes, a "witness against" the defendant when his statements are used only at a pretrial proceeding in which the determination of his guilt is not at stake.[5]

B. This Court's Decisions Confirm That Incrimination Prohibited By The Self-Incrimination Clause Focuses On The Use Of A Statement At The Guilt Or Penalty Phase Of A Criminal Trial

This Court has repeatedly stated that violations of the Self-Incrimination Clause can occur only at trial. And the Court has approved reliance on a defendant's statements in pretrial proceedings to adjudicate matters other than criminal responsibility. Both lines of decisions support the conclusion that no constitutional violation occurs by the use of compelled statements solely to establish probable cause in a preliminary hearing.

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[5] The use of the word "witness" in the Sixth Amendment's Compulsory Process Clause likewise focuses on evidence at trial that may affect the adjudication of guilt. See *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 55-56 (1987) (observing that the Compulsory Process Clause grants "criminal defendants * * * the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt"). Defendants have no constitutional right to compulsory process in pretrial proceedings like a probable cause hearing that do not determine guilt. See *Gerstein*, 420 U.S. at 121-122. The Constitution additionally uses the term "witness" in the Treason Clause, which expressly limits "witness[ing]" to testimony supporting guilt. See U.S. Const. Art. III, § 3, Cl. 1 ("No Person *shall be convicted* of Treason unless on the Testimony of two Witnesses to the same overt Act.") (emphasis added).

1. This Court has frequently emphasized that "[t]he privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental *trial right* of criminal defendants." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (emphasis added). The right does not "serve some value necessarily divorced from the correct ascertainment of guilt." *Withrow* v. *Williams*, 507 U.S. 680, 692 (1993). Rather, the Self-Incrimination Clause serves "to protect the fairness of the trial itself." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 240 (1973); see *Patane*, 542 U.S. at 637 (plurality opinion) (observing that the "core protection afforded by the Self-Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself at trial"); *Estelle*, 451 U.S. at 462-463 (declining "to distinguish between the guilt and penalty phases of [the defendant's] trial so far as the protection of the Fifth Amendment privilege is concerned").

Consistent with that understanding of the Self-Incrimination Clause's central purpose, this Court has stated that, "[a]lthough conduct by law enforcement officials prior to trial may ultimately impair [the Fifth Amendment] right, *a constitutional violation occurs only at trial.*" *Verdugo-Urquidez*, 494 U.S. at 264 (emphasis added); see, *e.g.*, *Patane*, 542 U.S. at 641 (plurality opinion) ("Potential violations [of the Self-Incrimination Clause] occur, if at all, only upon the admission of unwarned statements into evidence at trial."); *Chavez*, 538 U.S. at 767 (plurality opinion) ("Statements compelled by police interrogations of course may not be used against a defendant at trial, * * * but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs.");

New York v. *Quarles*, 467 U.S. 649, 686 (1984) (Marshall, J., dissenting) ("All the Fifth Amendment forbids is the introduction of coerced statements at trial."). Accordingly, when the government "acquire[s] incriminating evidence" from the defendant, the Self-Incrimination Clause "at most * * * entitle[s] [him] to suppress the evidence and its fruits if they [a]re sought to be used against him *at trial*." *United States* v. *Blue*, 384 U.S. 251, 255 (1966) (emphasis added); see *id.* at 254 (holding that the district court had erred in dismissing the indictment on the ground that it was based on "past compulsory self-incrimination"). The court of appeals' conclusion that a constitutional violation can occur even when a defendant's statements are not introduced at the guilt or penalty phases of a criminal trial thus contradicts a long line of this Court's decisions.

2. This Court's decision in *Estelle*—which approved using a defendant's compelled statements in a pretrial proceeding to determine his competency to stand trial, see 451 U.S. at 468-469—further establishes that *how* a compelled statement is used in a criminal case may determine whether that use implicates the Self-Incrimination Clause's protection.

The defendant in *Estelle* was required to submit to a court-ordered competency exam, during which he made statements to a psychiatrist without receiving warnings that the statements could be used against him. 451 U.S. at 456-457, 461. The prosecutor ultimately introduced those statements "as affirmative evidence to persuade the jury to return a sentence of death" at the penalty phase of the trial, and this Court held that reliance on the statements for that purpose violated the Self-Incrimination Clause. *Id.* at 466; see *id.* at 462 (declining to find that "incrimination is complete once guilt

has been adjudicated" because the Self-Incrimination Clause not only "prevents a criminal defendant from being made 'the deluded instrument of his own conviction,'" but "protects him as well from being made the 'deluded instrument' of his own execution") (citations and some internal quotation marks omitted).

But *Estelle* further observed that "no Fifth Amendment issue would have arisen" if the use of the defendant's statements had been confined to the competency proceeding itself to "ensur[e] that [the defendant] understood the charges against him and was capable of assisting in his defense." 451 U.S. at 465. A defendant can be compelled to answer questions in a court-ordered competency exam even after he invokes his right to remain silent, the Court explained, so long as "the results would be applied solely for th[e] purpose" of determining his competency to stand trial. *Id.* at 468.

As *Estelle* illustrates, whether a statement constitutes prohibited incrimination can turn on how it is used in a criminal proceeding—and, specifically, whether it is relied upon to convict or punish the defendant. *Estelle*'s distinction between the different uses of a defendant's compelled statements strengthens the conclusion that prohibited incrimination does not occur in pretrial proceedings where guilt and punishment are not at issue.

C. Historical Practice Supports The Conclusion That The Self-Incrimination Clause Does Not Extend To Uses Of A Statement In Pretrial Proceedings Where Guilt And Punishment Are Not Adjudicated

The privilege against self-incrimination arose out of the need to guard against an inquisitorial system of justice, where individuals were placed under oath, forced

to confess their guilt, and convicted and punished on that basis. That history does not support the court of appeals' conclusion that a violation can occur in pretrial proceedings with no use of a statement at any stage to determine criminal responsibility.

1. a. The historical abuses that prompted the privilege against self-incrimination trace to the medieval period, when ecclesiastical and secular courts in England and continental Europe required a defendant to demonstrate his innocence after he was formally accused by church leaders or private citizens. See *United States* v. *Gecas*, 120 F.3d 1419, 1436-1439 (11th Cir. 1997), cert. denied, 524 U.S. 951 (1998). The defendant generally had to perform a ritualistic test, such as a battle or ordeal, including trial by water and trial by fire. *Id.* at 1436-1437 & n.18. All "methods of proof relied entirely on the behavior of the defendant, under the threat of a penalty, to determine guilt," and "[i]n this sense, every conviction under the ancient methods of proof was a conviction based on self-incrimination." *Id.* at 1437; see, *e.g.*, 2 Frederick Pollock & Frederic William Maitland, *The History of English Law*: *Before the Time of Edward I* 598-602 (2d ed. 1898).

In the 13th Century, English common-law courts began to replace ritualistic tests with jury trials—but defendants continued to be compelled to incriminate themselves through a pretrial inquisition seeking confessions of guilt, with resulting compelled confessions providing the proof to convict and punish. See *Gecas*, 120 F.3d at 1440, 1442-1443. That practice was initially employed mainly in misdemeanor criminal cases, but it expanded to all felonies in the 16th Century when the British Parliament enacted the Bail Statute (An Act appointing an Order to Justices of Peace for the

Bailement of Prisoners, 1554, 1 & 2 Phil. & M., c. 13 (Eng.)) and the Committal Statute (An Acte to take thexaminacõn of Prysoners suspected of Manslaughter or Felonye, 1555, 2 & 3 Phil. & M., c. 10 (Eng.)). See *Gecas*, 120 F.3d at 1442. Those statutes authorized justices of the peace to interrogate suspects, obtain incriminating statements, and then present those statements to the jury at trial. See *ibid.* ("Reading the record of the examination was the first step in most criminal trials during the sixteenth and seventeenth centuries."); John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich. L. Rev. 1047, 1059-1060 (1994) (*Historical Origins*). Ecclesiastical courts operating under the prerogatives of the monarchy, such as the Star Chamber and the High Commission, likewise compelled religious dissenters to reveal their religious beliefs under oath, with punishments imposed for those forced confessions of conscience. See, *e.g.*, *Gecas*, 120 F.3d at 1446-1449; John H. Langbein, *The Origins of Adversary Criminal Trial* 277-278 (2003); R. H. Helmholz, *The Privilege and the* Ius Communie: *The Middle Ages to the Seventeeth Century*, *in* The Privilege against Self-Incrimination: Its Origins and Development 42 (R. H. Helmholz et al. eds. 1997) (The Privilege); see 5 W. S. Holdsworth, *A History of English Law* 187 (rev. 2d ed. 1937).

Those repressive practices generated a significant backlash, see *Miranda* v. *Arizona*, 384 U.S. 436, 458-460 (1966), and by the 17th Century, a consensus had emerged that suspects should not be questioned under oath. See Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*,

94 Mich. L. Rev. 2625, 2640 (1996) (*A Peculiar Privilege*). That right not to be compelled to testify under oath formed the early conception of the privilege against self-incrimination in England and colonial America. See *Doe*, 487 U.S. at 212 ("Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him," such as the "inquisitorial method" of "the ecclesiastical courts and the Star Chamber."). Violations of the privilege triggered exclusion of the evidence at trial, so that sworn confessions could not be used to convict or punish. See, *e.g.*, *Historical Origins* 1079 n.142; *A Peculiar Privilege* 2658-2659.

b. Although the Framing-era privilege guaranteed a right not to be compelled to testify under oath, defendants during that period in America and England routinely provided unsworn statements in pretrial interviews that were then introduced at trial. See, *e.g.*, *A Peculiar Privilege* 2654-2655; Eben Moglen, *The Privilege in British North America: The Colonial Period to the Fifth Amendment*, *in* The Privilege 112, 117. Scholars have attributed that practice to the absence of defense counsel in criminal trials. See, *e.g.*, John H. Langbein, *The Criminal Trial before the Lawyers*, 45 U. Chi. L. Rev. 263, 283 (1978). "Without counsel to shoulder the nontestimonial aspects of the defense, the accused's privilege would simply have amounted to the right to forfeit all defense." *Ibid.*

The development of the modern privilege in late 18th-Century England and America arose from the more active role defense counsel played during criminal trials. See *Historical Origins* 1071 ("Defense counsel

made the privilege against self-incrimination possible."). Once defense counsel could speak for a defendant at trial, he no longer needed to speak for himself to avoid conviction. *Id.* at 1069. Magistrates in England and the United States began warning defendants that they had a right to remain silent and that any statement they chose to provide could be "used against [them] on [their] trial." *Regina* v. *Arnold*, (1838) 173 Eng. Rep. 645, 645-646 (K.B.); see *A Peculiar Privilege* 2660-2661. By the end of the 18th Century, it was clear that the privilege against self-incrimination applied to all statements made by a defendant—whether under oath or not—that could be used to impose criminal punishment. See *A Peculiar Privilege* 2662-2663 & n.147.

c. As this history demonstrates, the historical practices that inspired the Framers to adopt the Self-Incrimination Clause involved convicting and punishing individuals based on their compelled testimony. By contrast, nothing in the historical record indicates that the Self-Incrimination Clause was intended to guard against the use of a defendant's compelled statements for the limited purpose of determining whether the case should go forward upon a showing of probable cause after charges were filed, with no subsequent use of the statements at the guilt or penalty stage of the case.

2. The court of appeals believed that history supported its application of the Self-Incrimination Clause to probable-cause hearings, but none of the evidence the court cited warrants extending the incrimination prohibited by the Fifth Amendment beyond the use of a statement to convict or punish a defendant.

a. The court of appeals' historical analysis focused on the meaning of a "criminal case" under the Self-

Incrimination Clause. Pet. App. 4a-20a. Relying on dictionary definitions and the Clause's ratifying history, the court of appeals concluded that "the phrase 'criminal case' includes probable cause hearings." *Id.* at 5a. But the court did not consider what uses of a defendant's statements make him "a witness against himself." U.S. Const. Amend. V. The court accordingly had no occasion to grapple with the historical evidence demonstrating that the Framers were concerned with the use of a defendant's statements to convict and punish him—and not with other potential consequences from an adverse ruling in a pretrial proceeding.

b. The court of appeals further cited "'historical sources [that] show that the right against self-accusation was understood to arise primarily in pretrial or pre-prosecution settings rather than in the context of a person's own criminal trial,'" because "criminal defendants were * * * unable to testify in their own criminal cases" at the Founding. Pet. App. 17a (citation omitted). But the court ignored that coerced confessions obtained in those pretrial interrogations were then used to convict the defendant *at trial*—which formed the primary evil the Self-Incrimination Clause redresses. See *Gecas*, 120 F.3d at 1442-1443; John H. Wigmore, *The Privilege Against Self-Crimination; Its History*, 15 Harv. L. Rev. 610, 628 (1902); *Historical Origins* 1055; *A Peculiar Privilege* 2653-2655.

The court of appeals' analysis at bottom confuses proceedings in which a self-incrimination *privilege* can be invoked with proceedings in which a self-incrimination *violation* occurs. Although testimonial statements were compelled in pretrial settings at the time of the Framing, as they can be today, prohibited incrimination does not occur until those statements are used against

a defendant to convict or punish him. See *Chavez*, 538 U.S. at 770-773 (plurality opinion); *Verdugo-Urquidez*, 494 U.S. at 264. The court's historical evidence confirms that the "inability to protect the right at one stage of a proceeding" through a privilege against self-incrimination "may make its invocation useless at a later stage," when a defendant's statements are introduced to prove his guilt. *Michigan* v. *Tucker*, 417 U.S. 433, 440-441 (1974). But the court cited no evidence to suggest that pretrial uses of a defendant's statements in and of themselves violate the Self-Incrimination Clause.

c. The court of appeals also observed that the Framers grouped a defendant's procedural trial rights into the Sixth Amendment, but placed the right against self-incrimination in "the Fifth Amendment with other rights that unambiguously extended to pretrial proceedings as well as the trial." Pet. App. 17a-18a. That drafting choice cannot bear the weight the court placed on it. No legislative history illuminates why the Self-Incrimination Clause was included in the Fifth Amendment. See *Balsys*, 524 U.S. at 674 & n.5. Perhaps the Framers intended to signal that the privilege applies to any "person" whose testimony may subject him to criminal sanction, and not solely to the "accused." Or perhaps the Self-Incrimination Clause fit more naturally into an amendment that lists negative prohibitions ("nor shall be compelled," U.S. Const. Amend. V) instead of positive rights ("shall enjoy the right," U.S. Const. Amend. VI).

In any event, the distinction the court drew between pretrial rights and trial rights cannot fully explain the Fifth and Sixth Amendments. Some Sixth Amendment rights attach and apply before trial. See, *e.g.*, *Rothgery*,

554 U.S. at 198 (right to counsel). And some Fifth Amendment rights have nothing to do with criminal proceedings. See, *e.g.*, U.S. Const. Amend. V (Just Compensation Clause). The placement of the Self-Incrimination Clause in the Fifth Amendment thus provides no reason to overlook the history demonstrating that its impetus was the use of compelled statements to convict and punish.

D. Extending The Self-Incrimination Clause To Pretrial Proceedings Would Have Adverse Consequences For The Criminal Process

A holding that "the Fifth Amendment precludes use of compelled statements in pretrial proceedings," Pet. App. 19a, would require courts to make complex determinations about the admissibility of a defendant's statements before resolving other preliminary issues in a case. That would change the nature and purpose of pretrial proceedings, which are frequently informal and intended to expeditiously resolve discrete issues unrelated to guilt and punishment. The Self-Incrimination Clause does not mandate that disruption to the criminal process.

1. If the Self-Incrimination Clause extends to uses of a statement in pretrial proceedings, courts will be required to assess the admissibility of a defendant's statements before resolving other preliminary issues in the case, such as whether probable cause exists to bind the defendant over for trial and whether and in what amount bail should be set. In many cases, resolution of the collateral Fifth Amendment question will be far more complicated than the bottom-line determination in the preliminary proceeding itself.

Evaluating whether a defendant's statements were voluntary, for example, requires assessment of the totality of the circumstances, including the length and circumstances of the interrogation and the defendant's individual characteristics. See, *e.g.*, *Schneckloth*, 412 U.S. at 224, 226-227 (observing that no "talismanic definition of 'voluntariness'" exists and courts must engage in "careful scrutiny of all the surrounding circumstances") (citation omitted). If *Miranda* warnings were required to admit statements in pretrial proceedings, that would likewise raise a host of factual questions—for example, "[w]hether the suspect was in 'custody,' whether or not there was 'interrogation,' whether warnings were given or were adequate, whether the defendant's equivocal statement constituted an invocation of rights, [and] whether waiver was knowing and intelligent." *Withrow*, 507 U.S. at 709-710 (O'Connor, J., concurring in part and dissenting in part) (footnotes omitted).[6] And determining whether a statement was compelled under *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), may implicate a variety of subsidiary factual and legal questions concerning whether the defendant believed his employer had threatened him with the loss of his job, whether that belief was objectively reasonable, and whether he voluntarily waived his Fifth Amendment privilege. See, *e.g.*, *United States* v. *Friedrick*, 842 F.2d 382, 396-402 (D.C.

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[6] *Miranda* has not been applied by this Court to bar anything but the use of unwarned statements to prove guilt in the government's case in chief. See, *e.g.*, *Dickerson* v. *United States*, 530 U.S. 428, 442 (2000). Consistent with its prophylactic purpose and limits, *Miranda* should not extend to preliminary proceedings, even if statements resulting from actual coercion cannot be introduced in such proceedings.

Cir. 1988) (addressing parties' disputes on several of those issues).

This case illustrates the point. Respondent alleges that his statements during the internal investigation were compelled because he made them "as a condition of employment." Pet. App. 49a. Under respondent's view of the Self-Incrimination Clause, if he had objected to the introduction of his statements, his preliminary hearing would have skidded to a halt while the parties fought over questions such as whether respondent was told he had to answer questions, whether his job was jeopardized, whether he received *Garrity* warnings, and whether he had already submitted his resignation letter and what effect thus would have on the *Garrity* analysis.

Interpreting the Self-Incrimination Clause to require such determinations even when a defendant's statements are not used to prove guilt or punishment would derail preliminary hearings with collateral suppression litigation and disrupt the procedures that apply in those hearings. Preliminary hearings frequently employ "informal procedure[s]" that are "justified not only by the[ir] lesser consequences * * * but also by the nature of the determination[s]" themselves. *Gerstein*, 420 U.S. at 121. Given the distinct function of pretrial proceedings and the limited issues they resolve, the rules of evidence generally do not apply. See Fed. R. Evid. 1101(d)(3); see also, *e.g.*, 18 U.S.C. 3142(f) (providing that evidentiary rules do not apply to pretrial bail determinations); *Brinegar* v. *United States*, 338 U.S. 160, 172, 174 n.12 (1949) (describing "the inappropriateness of applying the rules of evidence as a criterion to determine probable cause," and approving reliance on particular evidence to prove probable cause even though the

same evidence could not be "admi[tted] in evidence to prove the accused's guilt"). Requiring adjudication of suppression issues would thus fundamentally alter the nature of pretrial proceedings.

Indeed, the factfinder in a preliminary proceeding in the federal system will often lack authority to rule on the admissibility of a defendant's statements. The Federal Magistrates Act, 28 U.S.C. 631 *et seq.*, empowers magistrate judges (with enumerated exceptions) to "hear and determine any pretrial matter" designated by the district court, 28 U.S.C. 636(b)(1)(A), including preliminary examinations and bail determinations. 28 U.S.C. 636(a)(2) and (b)(1)(A); *Gonzalez* v. *United States*, 553 U.S. 242, 245 (2008); see Fed. R. Crim. P. 5.1(a) (providing that probable cause hearings should be conducted by magistrates). But the statute expressly withholds authority to resolve motions "to suppress evidence in a criminal case," instead limiting magistrate judges to "propos[ing] findings and recommendations" on such motions. 28 U.S.C. 636(b)(1)(A)-(C); see *Giordenello* v. *United States*, 357 U.S. 480, 484 (1958) (observing that "the Commissioner"—a magistrate judge's predecessor position—"had no authority to adjudicate the admissibility [of the evidence] at [the defendant's] later trial," as "[t]hat issue was for the trial court"). In recognition that preliminary hearings conducted by magistrate judges are not a proper forum to raise suppression issues, Federal Rule of Criminal Procedure 5.1 provides that a defendant in the preliminary proceeding "may not object to evidence on the ground that it was unlawfully acquired." Fed. R. Crim. P. 5.1(e).

In addition, a requirement that suppression issues be resolved in the course of preliminary proceedings

would delay those proceedings and raise difficult questions about what a defendant must do to preserve an argument that his statements were compelled. Many pretrial proceedings—including, in particular, preliminary hearings to assess probable cause—are intended to be completed soon after charges are filed. See, *e.g.*, Fed. R. Crim. P. 5.1(c) (preliminary hearing generally should occur within 21 days after arrest if the defendant is not detained); Kan. Stat. Ann. § 22-2902(2) (Supp. 2016) (preliminary hearing generally should occur within 14 days). This Court has indicated that defendants should not be required to raise suppression issues at such an early stage in the criminal proceedings. See *Giordenello*, 357 U.S. at 483 (holding that the defendant did not waive his right to file a suppression motion by waiving his probable cause hearing in part because a suppression claim "may involve legal issues of subtlety and complexity which it would be unfair to require a defendant to present so soon after arrest"). And adjudication of any suppression objections that are raised would delay resolution of the ultimate issues in the preliminary proceedings, creating substantial disruption of the pretrial process.

Even suppression hearings themselves could devolve into a series of subsidiary suppression issues on the use of statements that have nothing to do with a defendant's guilt or punishment. For example, a defendant could claim that statements showing that he had abandoned searched property were involuntary, creating a spin-off suppression question. Courts have correctly rejected extending the Self-Incrimination Clause to that context, reasoning that the Clause "preserv[es] the integrity of our criminal trials" and thus "should not be superimposed *ipso facto* to the wholly different considerations"

in adjudicating a suppression motion. *United States* v. *Garcia*, 496 F.2d 670, 675 (5th Cir. 1974), cert. denied, 420 U.S. 960 (1975).

In sum, the court of appeals' interpretation of the Self-Incrimination Clause would unsettle current practice and disrupt the timing and process of adjudication of pretrial matters. Those practical problems weigh against an extension of the Clause in proceedings that do not adjudicate guilt or punishment and are far afield from the Clause's textual focus and animating purpose.

2. A holding that the Fifth Amendment prohibits the use of compelled statements in pretrial proceedings would create the further anomaly that the prosecution's introduction of such statements in a suppression hearing to determine their admissibility would *itself* violate the Constitution. See Pet. App. 19a ("If the Fifth Amendment applies to pretrial proceedings, the evidence would be considered inadmissible in pretrial proceedings as well as at trial."). The Federal Rules of Evidence recognize and address the similar issue that can arise under the evidentiary rules by providing that courts are not "bound by" those rules when resolving "any preliminary question about whether * * * evidence is admissible." Fed. R. Evid. 104(a); see Fed. R. Evid. 1101(d)(1). But the text of the Self-Incrimination Clause offers no similar carve out if the concept of prohibited incrimination sweeps beyond the adjudication of a defendant's guilt and punishment.

Indeed, the plaintiffs in *Stoot* v. *City of Everett*, 582 F.3d 910 (9th Cir. 2009), cert. denied, 559 U.S. 1057 (2010), asserted precisely this theory of a Fifth Amendment violation in a suit for damages under 42 U.S.C. 1983. The Ninth Circuit in *Stoot* held that a Self-Incrimination Clause violation occurs when compelled

statements are used in probable cause hearings and bail determinations, but the court rejected the plaintiffs' argument that they suffered a further Fifth Amendment violation through the use of the statements "at the pretrial hearing to determine the admissibility of those same statements." 582 F.3d at 925 n.14. The Court offered no doctrinal or analytical basis to distinguish among those various uses, however. All of them expose the defendant to some potential adverse consequence within his criminal case, but none of them involves the determination of guilt or punishment. The extension of the Self-Incrimination Clause to pretrial proceedings has no logical end point—creating the risk that the introduction of a statement to determine its admissibility would in and of itself compel the defendant to be a witness against himself in a criminal case.

E. The Use Of Respondent's Statements At A Probable Cause Hearing Did Not Constitute Incrimination Prohibited By The Self-Incrimination Clause

In this case, respondent's statements were never used against him to determine his guilt or punishment at a criminal trial. Instead, the statements were used only at a probable cause hearing to determine whether respondent should be "bound over to the district judge having jurisdiction to try the case." Kan. Stat. Ann. § 22-2902(3) (Supp. 2016). The use of respondent's statements for that limited purpose did not violate the Self-Incrimination Clause.

1. A preliminary hearing is not intended to adjudicate a defendant's guilt of a criminal offense. Instead, "its function is the more limited one of determining whether probable cause exists to hold the accused for trial." *Barber*, 390 U.S. at 725. Although a defendant who is bound over for trial experiences some restraint

on his liberty, this Court has rejected the argument that any deprivation of a liberty interest triggers the Self-Incrimination Clause's protection. See, *e.g.*, *Allen*, 478 U.S. at 372-373 (civil confinement). And pretrial restraints imposed pending trial cannot be punitive, see *United States* v. *Salerno*, 481 U.S. 739, 746-747 (1987), so no risk exists that introduction of a defendant's statements in such proceedings will result in the imposition of criminal punishment.

In recognition that probable cause determinations are far removed from the ultimate questions of guilt and punishment, "the Court has approved * * * informal modes of proof" in preliminary hearings and held that "adversary safeguards are not essential" to assess probable cause." *Gerstein*, 420 U.S. at 120. The Sixth Amendment right to counsel applies to preliminary hearings like those employed by Kansas to safeguard a defendant's trial rights, see *Coleman* v. *Alabama*, 399 U.S. 1, 9-10 (1970) (opinion of Brennan, J.), but the bottom-line determination in a preliminary hearing to assess probable cause focuses on the different question whether the prosecution can proceed. The "difference in standards and latitude allowed in passing upon the distinct issues of probable cause and guilt," *Brinegar*, 338 U.S. at 174, reflects the "lesser consequences of a probable cause determination," *Gerstein*, 420 U.S. at 121. A defendant faces no risk of prohibited incrimination in that pretrial proceeding, which is provided for his benefit to obtain early dismissal of charges in appropriate cases long before his guilt and punishment will actually be adjudicated.

2. The impact of a preliminary hearing on the subsequent course of a criminal case does not justify extend-

ing the Self-Incrimination Clause to that pretrial proceeding. A finding of probable cause, like a finding that the defendant is competent to stand trial, removes a procedural barrier to further prosecution. But neither finding alters the prosecutor's burden of proving guilt beyond a reasonable doubt in the subsequent trial in which the defendant will enjoy Self-Incrimination Clause protection. The interest in avoiding trial altogether is fundamentally different than the interest in avoiding conviction and punishment at the conclusion of a trial—and it accordingly is not a type of incrimination prohibited by the Self-Incrimination Clause.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 2017

No. 16-1495

IN THE
Supreme Court of the United States

CITY OF HAYS, KANSAS,
Petitioner,

v.

MATTHEW JACK DWIGHT VOGT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE OF AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES AND AMERICAN FEDERATION OF TEACHERS IN SUPPORT OF RESPONDENT VOGT

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QUESTION PRESENTED

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself[.]" To give necessary force to the fundamental right of a person to be free from governmental coercion, this Court has long-recognized that once a public employee has been compelled by his government employer to provide a statement under threat to his livelihood, that statement may not be used against him in subsequent criminal proceedings. *See, e.g., Garrity v. State of New Jersey*, 385 U.S. 493, 500 (1967).

The question presented is whether the Fifth Amendment privilege against self-incrimination prohibits the government from using a criminal defendant's compelled statement against him in a post-charge, in-court probable cause hearing.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
STATEMENT OF INTEREST	1
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
I. The Court of Appeals Should Be Affirmed Because Officer Vogt's Statements Were Compelled and Subsequently Used Against Him in a Criminal Case in Violation of the Fifth Amendment	5
a. Officer Vogt's Statements Were Compelled	5
b. Officer Vogt's Compelled Statements Were Used Against Him in a Criminal Case	8
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES:

Conyers v. Merit Sys. Prot. Board, 388 F.3d 1380, 1383 (Fed. Cir. 2004) 2

Garrity v. State of New Jersey, 385 U.S. 493 (1967) ..... i, 3, 4

N.L.R.B. v. J. Weingarten, Inc., 420 U.S. 251 (1975) 2

Sher v. U.S. Dept. of Veterans Affairs, 488 F.3d 489 (1st Cir. 2007) 6

Uniformed Sanitation Men Assn. v. Commissioner of Sanitation of the City of New York, 392 U.S. 280 (1968) 4

Vogt v. City of Hays, Kansas, 844 F.3d 1235 (10th Cir. 2017) 5, 8

Weston v. U.S. Dep't of Housing and Urban Development, 724 F.2d 943 (Fed. Cir. 1983) 3

ADMINISTRATIVE CASES:

Dep't of the Air Force, Hill AFB, and AFGE, Local 1592, 68 F.L.R.A. No. 80 (2015), *aff'd*, 836 F.3d 1291 (10th Cir. 2016) 2

Pedeleose v. Dep't of Defense, 110 M.S.P.R. 508 (2009), *aff'd*, 343 Fed. App'x 605 (Fed. Cir. 2009) 3

Sher v. Dep't of Veterans Affairs, 97 M.S.P.R. 232 (2004) 6

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. V ..... i, 8

U.S. Const. amend. VI 8, 9

STATUTES:

5 U.S.C. § 7101 1

5 U.S.C. § 7114(a)(2) 2

5 U.S.C. § 7701(a)(1) 2

INTEREST OF THE AMICI[1]

The American Federation of Government Employees, AFL-CIO (AFGE) is a national labor organization that, on its own and in conjunction with affiliated councils and locals, represents over 650,000 civilian employees in agencies and departments across the federal government and in the District of Columbia. AFGE's representation of these employees includes collective bargaining and direct representation in unfair labor practice proceedings and grievance arbitrations arising under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.* AFGE's representation of federal employees also extends to litigation before the United States Merit Systems Protection Board, the United States Equal Employment Opportunity Commission, and before federal district and appellate courts across the United States.

The American Federation of Teachers (AFT), also an affiliate of the AFL-CIO, was founded in 1916 and today represents approximately 1.7 million members. AFT represents a variety of employees in the public sector, including in K-12 and higher education, healthcare, and local, state, and federal government. AFT has long advocated for the rights of its members and the communities they serve through organizing,

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[1] The parties have filed blanket letters of consent to *amicus* briefs in support of either party or neither party. No counsel for a party authored this brief in whole or in part, and no person or entity other than AFGE and AFT or their counsel made a monetary contribution to the preparation or submission of this brief.

litigation, legislation, and collective bargaining. AFT staff and members are also involved in protecting the constitutional, statutory, and contractual rights of its members through direct representation. AFT's public service members' ability to invoke their constitutional rights is directly impacted by the scope of the *Garrity* doctrine, and therefore AFT has a strong interest maintaining the integrity of the doctrine.

In this regard, both AFGE and AFT frequently represent employees in employer-initiated interviews or investigations. *See generally N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). AFGE, for example, routinely represents federal civilian employees in formal discussions concerning personnel policies or practices or other general conditions of employment, and in disciplinary examinations "in connection with an investigation[.]" 5 U.S.C. § 7114(a)(2). AFGE also assists federal employees in circumstances in which the employees may be deprived of a union representative during an employer interview or investigation. *See Dep't of the Air Force, Hill AFB, and AFGE, Local 1592*, 68 F.L.R.A. No. 80 (2015), *aff'd*, 836 F.3d 1291 (10th Cir. 2016) (finding employees have no right to union representation in interviews conducted by the Air Force Office of Special Investigations); *see also Conyers v. Merit Sys. Prot. Board*, 388 F.3d 1380, 1383 (Fed. Cir. 2004) (finding that Transportation Security Officers represented by AFGE are not subject to the employment appeal protections granted by 5 U.S.C. § 7701(a)).

Public employees represented by amici are, moreover, subject to the "obey now, grieve later" rule. They are required as a condition of their employment

to answer questions or provide statements when directed to do so by their government employer. The penalty for refusal is the potential termination of their employment or other administrative discipline. Public employees, in other words, are compelled under threat to their livelihood to answer employment-related questions and provide employment-related statements when so commanded by the government.

As a result, such employer-initiated interviews and examinations are predominantly mandatory in nature. It is established law, in this regard, that employees may be subject to discipline, such as the termination of their employment, if they refuse to cooperate and answer any questions to which they may be put. *See, e.g., Weston v. U.S. Dep't of Housing and Urban Development*, 724 F.2d 943 (Fed. Cir. 1983) ("Nevertheless, when an employee is once granted immunity through this so-called *Garrity* exclusion rule, he may be removed for failure to cooperate with an agency investigation."); *Pedeleose v. Dep't of Defense*, 110 M.S.P.R. 508, 516 (2009) *aff'd*, 343 Fed. App'x 605 (Fed. Cir. 2009) (a federal employee must comply with an agency order to cooperate in an investigation or face discipline, even when the employee may have substantial reason to question the validity of the order).

Mandatory interviews and examinations are a part of nearly all employment relationships. The employees represented by amici therefore rely on the key constitutional protection embodied by the *Garrity* doctrine when cooperating in employment-related investigations. Consequently, amici have a strong interest in ensuring that public employees are not "relegated to a watered-down version of constitutional

rights." *Garrity*, 385 U.S. at 500; *see also Uniformed Sanitation Men Assn. v. Commissioner of Sanitation of the City of New York*, 392 U.S. 280. (1968).

SUMMARY OF THE ARGUMENT

Officer Vogt's statements were compelled and then used against him in a "criminal case." The use of Officer Vogt's statements against him in a criminal case contravened the Fifth Amendment.

Officer Vogt's statements were compelled because they were directed and required by his employer, the City of Hays, Kansas. Pursuant to the "obey now, grieve later" rule, his refusal to provide a statement would have subjected him to discipline, such as the termination of his employment. This compulsion rendered his statement involuntary. A finding to the contrary would, moreover, overlook the realities of the public workplace. It would also be contrary to this Court's settled precedent.

The power of the government to compel an employee to speak in the course of an employment-related investigation cannot be overstated. It is no mere subtle enticement. It is the overwhelming coercion brought to bear by the fact that a refusal to speak may deprive the employee of his livelihood, and yield the short- and long-term career and financial consequences that such deprivation entails. The prohibition on the use of compelled statements in criminal proceedings is thus a crucial check on the power of the state.

Officer Vogt's compelled statements were also clearly used against him in a criminal case. At the

time of the statements' use, Officer Vogt had already been charged with a crime; two felonies. Criminal prosecution had, in fact, commenced. To find otherwise would not only ignore the reality of the situation, it would deprive public employees of the full scope of their constitutional right to be free from compulsory self-incrimination. It would drastically weaken the check on government power that public employees and employers rely on for the efficient and orderly performance of their work.

The Court of Appeals correctly held that the Fifth Amendment right against self-incrimination is not limited to a trial right. *Vogt v. City of Hays, Kansas*, 844 F.3d 1235, 1241 (10th Cir. 2017). The Court of Appeals also correctly held that the government's use of Officer Vogt's compelled statements at a probable cause hearing violated his Fifth Amendment privilege against self-incrimination. Consequently, the Court should affirm the judgment of the Court of Appeals.

ARGUMENT

I. The Court of Appeals Should Be Affirmed Because Officer Vogt's Statements Were Compelled and Subsequently Used Against Him in a Criminal Case in Violation of the Fifth Amendment

a. Officer Vogt's Statements Were Compelled

Administrative coercion is one of the most effective and widespread tools used by public employers to compel an employee to make a statement during an investigation. This is why a clear-eyed understanding of the protection guaranteed by the *Garrity* doctrine is so important. Employees often rely on

Garrity's exclusionary doctrine when they choose to cooperate in an administrative investigation. This is not because these employees wish to conceal wrongdoing or impede a properly constituted employment investigation. Rather, they rely on *Garrity* because it is a settled rule that encourages the free-flow of information and preserves labor peace.

Looked at another way, an employee faced with the prospect of making a statement when confronted with an "obey now, grieve later" situation faces an immediate dilemma. The employee must cooperate or risk discipline. *See Sher v. Dep't of Veterans Affairs*, 97 M.S.P.R. 232 (2004) (discussing obey now, grieve later and the application of *Garrity*); *see also Sher v. Dep't of Veterans Affairs*, 488 F.3d 489, 501-02 (1st Cir. 2007) ("Thus, together, *Garrity* and *Gardner* stand for the proposition that a government employee who has been threatened with an adverse employment action by her employer for failure to answer questions put to her by her employer receives immunity from the use of her statements or their fruits in subsequent criminal proceedings, and, consequently, may be subject to such an adverse employment action for remaining silent."). This dilemma poses a serious question that does not cease to exist even for employees who are wholly innocent of any misconduct or criminal wrongdoing. All employees must weigh the possibility of criminal exposure in the moment or in the future.

A robust exclusionary rule pursuant to *Garrity* thus strikes the right balance, consistent with the Fifth Amendment. It relieves the individual employee from having to make a protracted legal analysis

that he may be ill-equipped to make, especially in the absence of counsel or an experienced union representative. It ensures, at the same time, that the employer is able to conduct its investigation in a timely and thorough manner. Swift employee cooperation is fostered by the knowledge that any statement the employee is ordered to make is compelled and may not be used against him in a criminal case. Employees are more likely to be immediately and wholly forthcoming in personnel matters if they are secure in the knowledge that whatever specter of criminal prosecution may or may not exist, they will not face incrimination from their own mouths or the derivative fruits therefrom.

But if the efficacy of the *Garrity* doctrine were to be called into doubt, or weakened by a reduction in the scope of its protection, it is not hard to predict that employees would then second-guess the wisdom of unfettered cooperation in employment-related investigations. The calculation would become much more difficult and complex. Employees would be forced to consider to what extent or in what context their words might be used against them, and to grapple with the questions of which rules of criminal procedure might apply and what the parameters of those rules might be. In other words, employees would have to weigh the potential deprivation of liberty over the deprivation of property. Faced with such uncertainty, even the most erstwhile employee might choose silence and potential termination over the possibility of criminal prosecution.

A narrow rule against self-incrimination would thus not serve the public interest in efficient and

transparent government. For example, it would diminish the incentive for employees to blow the whistle and report misconduct, and imbue cooperation with the fear that the machinery of the government's criminal process might turn their earnest statements against them. It would, moreover, generate delay as employees would undoubtedly seek to consult with counsel when weighing whether to cooperate or risk the burden of prosecution.

Applied here, it is apparent that Officer Vogt's statements were compelled. The petitioner conditioned Officer Vogt's continued employment on providing statements about the very same subject matter that led to the probable cause hearing at which those statements were introduced against him. *Vogt*, 844 F.3d at 1250. This is the essence of compulsion.

b. Officer Vogt's Compelled Statements Were Subsequently Used Against Him in a Criminal Case

Adding to these policy and factual considerations, it is beyond cavil that the text of the Fifth Amendment's prohibition on the use of an accused's compelled statement against him is not limited to use at trial. By its plain language, the amendment contains no such limitation. The Fifth Amendment instead deliberately uses the broader phrase "in any criminal case." This is significant because the Framers well-knew the word "trial" and certainly knew how to use it, had they so intended. But they did not.

For example, in contrast to the Fifth Amendment, the Sixth Amendment, uses the phrase "speedy and public trial" to expound a right enjoyed by an ac-

cused within the context of a "criminal prosecution." Put differently, the constitution makes a "speedy and public trial" one discrete right that an accused enjoys when confronted with the larger burden of a "criminal prosecution." A speedy and public trial is, in other words, just a part of what an accused is entitled to when faced with a criminal prosecution. A "criminal case" is a larger concept still, and it is in the context of the overall criminal case that an accused has the right to be free from self-incrimination. That the two amendments originated with the same author, James Madison, only reinforces this reading.

Further, while it should be self-evident from both historical and legal precedent that a criminal case encompasses more than trial, the Court need not decide the exact moment that a criminal case commences in order to affirm the judgment of the Court of Appeals here. Officer Vogt had been charged criminally. Prosecution had commenced. He faced a hearing in open court. From every practical perspective, Officer Vogt was a defendant in an ongoing criminal case from the moment the probable cause hearing at issue in this case began.

Finally, there is nothing unjust or unworkable in adjudicating the voluntariness of a statement at the probable cause stage. On the one hand, courts resolve such questions all the time, before trial. Doing so before reaching the question of probable cause is no different. On the other hand, the consequences of a probable cause hearing may be severe. Following a finding of probable cause, a defendant may, for example, be remanded into custody while he awaits trial. To have such an incarceration occur on the

back of a compelled statement, even temporarily, offends the Fifth Amendment.

Simply put, a Fifth Amendment violation requires three elements: (1) the individual asserting the violation must have been **compelled** to make a statement; and (2) that compelled statement must have been **used** by the government against the individual; and (3) the government's use of the compelled statement must have been in a **criminal case**. All three of these required elements are satisfied in this case.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeals.

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No. 16-1495

IN THE

Supreme Court of the United States

CITY OF HAYS, KANSAS,

Petitioner,

vs.

MATTHEW JACK DWIGHT VOGT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When a person is required by his employer to make statements about possible criminal activity, which, if any, of the following uses of the statements constitute being a witness against himself in a criminal case within the meaning of the Fifth Amendment:

1. Use of the statements to investigate and locate additional evidence.

2. Initiating a prosecution based on the statements and additional evidence.

3. Introducing the additional evidence in a probable cause hearing.

4. Introducing the defendant's own statements in a probable cause hearing.

TABLE OF CONTENTS

Question presented. i

Table of authorities. iv

Interest of *amicus curiae*. 1

Summary of facts and case. 2

Summary of argument. 3

Argument. 5

I. The Fifth Amendment's privilege against self-incrimination has been interpreted more broadly than the protection against compelling a person in a criminal case to testify or provide testimonial evidence against himself. 5

A. Development of use and derivative use immunity under the Fifth Amendment. 5

B. Compelled incriminating statements made by government employees. 9

II. Excluding the reliable non-testimonial physical "fruit" of a compelled statement is inconsistent with this Court's recent interpretation of "witness" as that term is used in the Bill of Rights. 10

III. Neither investigation, initiation of prosecution, nor introduction of "fruits" violates the Fifth Amendment. 13

Conclusion. 14

TABLE OF AUTHORITIES

Cases

Chavez v. *Martinez*, 538 U. S. 760 (2003)..... 13

Counselman v. *Hitchcock*, 142 U. S. 547 (1892)..... 7

Crawford v. *Washington*, 541 U. S. 36 (2004)..... 10, 11, 12

Gardner v. *Broderick*, 392 U. S. 273 (1968)..... 9

Garrity v. *New Jersey*, 385 U. S. 493 (1967)..... 9, 11

Kastigar v. *United States*, 406 U. S. 441 (1972)..... 6, 7, 8, 9, 11

Lefkowitz v. *Turley*, 414 U. S. 70 (1973)..... 5, 10

Malloy v. *Hogan*, 378 U. S. 1 (1964)..... 8

Miranda v. *Arizona*, 384 U. S. 436 (1966)..... 5

Murphy v. *Waterfront Comm'n of N. Y. Harbor*, 378 U. S. 52 (1964)..... 5, 8, 9

Schmerber v. *California*, 384 U. S. 757 (1966)..... 12

Uniformed Sanitation Men Assn., Inc. v. *Commissioner of Sanitation of City of New York*, 392 U. S. 280 (1968)..... 9

United States v. *Murdock*, 284 U. S. 141 (1931)..... 8

Vogt v. *City of Hays*, 844 F. 3d 1235 (CA10 2017)..... 2, 3

United States Statutes

U. S. Const., Amend. V. 5

U. S. Const., Amend. VI. 12

Secondary Authorities

Amar & Lettow, Fifth Amendment First Principles: The Self-Incrimination Clause, 93 Mich. L. Rev. 857 (1995). 7, 8, 11

Clymer, Compelled Statements From Police Officers and Garrity Immunity, 76 N. Y. U. L. Rev. 1309 (2001). 10

McMahon, *Kastigar v. United States*: The Immunity Standard Redefined, 18 Cath. Law. 314 (1972). 6, 7, 8

Wigmore, The Privilege Against Self-Crimination; Its History, 15 Harv. L. Rev. 610 (1902). 5

IN THE

Supreme Court of the United States

CITY OF HAYS, KANSAS,

Petitioner,

vs.

MATTHEW JACK DWIGHT VOGT,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves an interpretation of the Fifth Amendment Self-Incrimination Clause that is more

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1. Both parties have filed blanket consents to *amicus* briefs.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

expansive than its words allow. Such an interpretation is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Respondent, a police officer, was employed by the City of Hays Police Department ("Hays"). *Vogt* v. *City of Hays*, 844 F. 3d 1235, 1238 (CA10 2017). In late 2013, respondent interviewed for a new job with the City of Haysville Police Department ("Haysville") while still employed by Hays. *Ibid.* During the screening process, respondent divulged that he had kept a knife he acquired while working as a Hays officer. *Ibid.*

Haysville offered respondent a job on the condition that he inform Hays about the knife. Respondent subsequently satisfied the condition when he apprised the Hays Police Chief of the knife in his possession. *Ibid.* The Hays Police Chief instructed respondent to write down facts relating to how he came into possession of the knife. In response, respondent tendered a vague one-sentence statement. *Ibid.* Intending to accept the new job with Haysville, he notified Hays that he was resigning his position. *Ibid.*

Hays opened an internal investigation and respondent gave a more detailed statement about how the knife came into his possession. *Ibid.* Additional evidence was then located by Hays. *Ibid.* The internal investigation was then suspended, and a criminal investigation was commenced by the Kansas Bureau of Investigation ("KBI"). *Ibid.* All evidence collected by Hays was turned over to the KBI. *Ibid.*

Notice of the KBI's criminal investigation led Haysville to withdraw its job offer. *Ibid.* Respondent was then subsequently charged with two felony counts relating to the knife. *Ibid.*

At a probable cause hearing, the statements respondent made to the Hays Police Chief and the evidence collected during the internal investigation were submitted as evidence against respondent. *Ibid.* The two felony counts were ultimately dismissed by the trial court because of a lack of probable cause to support the charges. *Ibid.*

Respondent filed a civil suit against his former employer pursuant to 42 U. S. C. § 1983, alleging that his Fifth Amendment right to be free from self-incrimination was violated.[2] *Vogt*, 844 F. 3d, at 1238. The District Court granted petitioner's motion to dismiss, concluding that because the incriminating statements were not utilized against respondent at trial, he did not establish a valid claim under the Fifth Amendment. *Id.*, at 1239. The Tenth Circuit reversed in part holding that because a probable cause hearing is part of a "criminal case," as that term is used in the Fifth Amendment, respondent stated a valid claim against petitioner. *Id.*, at 1246.

SUMMARY OF ARGUMENT

The Fifth Amendment privilege against self-incrimination has traditionally been interpreted more broadly than the words of the Amendment provide. The broad interpretation began near the end of the nineteenth century with *Counselman* v. *Hitchcock*, a decision that

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2. The respondent also filed suit against Haysville and four individual officers. The Tenth Circuit affirmed the dismissal of the claims against the four officers based on qualified immunity. *Id.*, at 1247. The dismissal of the claim against Haysville was also affirmed because the Court of Appeals found it did not compel respondent to incriminate himself. *Id.*, at 1249.

brushed aside early American precedent to establish a sweeping privilege. In the mid-twentieth century, the federal constitutional privilege was extended to the states but also trimmed back somewhat in scope. It remains broader than its language, however.

In *Crawford* v. *Washington*, this Court overruled decades-old precedent on the Confrontation Clause to reconsider what it means to be a "witness" for the purpose of the Sixth Amendment. Unless the word "witness" means two very different things in two amendments that were proposed and ratified as part of the same package, this also requires reconsideration of the Self-Incrimination Clause.

Physical evidence is not a "witness," and a person who merely informs the authorities where physical evidence is located is also not a "witness." Use of a compelled statement to locate physical evidence is therefore not a violation of the Fifth Amendment, although other legal rights may be implicated depending on the circumstances.

In this case, neither the use of respondent's statement to locate additional evidence, the use of the statement and evidence to initiate a prosecution, nor the introduction of the additional evidence in the probable cause hearing violated the Fifth Amendment.

ARGUMENT

I. The Fifth Amendment's privilege against self-incrimination has been interpreted more broadly than the protection against compelling a person in a criminal case to testify or provide testimonial evidence against himself.

A. Development of use and derivative use immunity under the Fifth Amendment.

The Self-Incrimination Clause of the Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U. S. Const., Amend. V. *Lefkowitz* v. *Turley*, 414 U. S. 70, 77 (1973), states the broad interpretation given to these words in the late nineteenth and twentieth century:

> "The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."

The historical development of the privilege prior to being firmly embedded into our country's Bill of Rights is extensive. See generally Wigmore, The Privilege Against Self-Crimination; Its History, 15 Harv. L. Rev. 610 (1902). "Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty . . . ." *Miranda* v. *Arizona*, 384 U. S. 436, 459 (1966). Thus, the privilege "registers an important advance in the development of our liberty – 'one of the great landmarks in man's struggle to make himself civilized.' " *Murphy* v. *Waterfront Comm'n of N. Y. Harbor*, 378 U. S. 52, 55 (1964)

(quoting *Ullmann* v. *United States*, 350 U. S. 422 (1956)).

However, the government also needs, and has always had, broad power to compel people to disclose what they know about crime. This includes the power of the government to compel the attendance of witnesses in an accused's favor and to compel the testimony of witnesses against him. *Kastigar* v. *United States*, 406 U. S. 441, 443-444 (1972) ("The power to compel testimony, and the corresponding duty to testify, are recognized in the Sixth Amendment . . . "). Recognizing that the prosecution of some crimes requires the testimony of witnesses whose answers have the potential to be self-incriminating, immunity rules that "seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify" emerged. *Id.*, at 445-446, and n. 13. "The existence of these statutes reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime." *Id.*, at 446.

The scope of these immunity rules, however, has been a topic of conflict since Congress passed its first immunity statute in 1857. McMahon, *Kastigar v. United States*: The Immunity Standard Redefined, 18 Cath. Law. 314, 318, and n. 21 (1972). This first Act granted immunity from prosecution to anyone who testified before a Congressional Committee as to any act whether or not it was related to the subject under investigation. *Id.*, at 318. As a result of these witness "immunity baths," in 1862 Congress amended the statute to permit witness immunity only to the *use* of the testimony actually given. *Id.*, at 318, and n. 23. Thus, the witness was no longer completely immune

from prosecution, but rather only the use of his statements were to be excluded.[3]

The constitutionality of the Immunity Act of 1868 was first examined in *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892). As noted, the statute at issue permitted only the exclusion of the compelled statements themselves (*i.e.*, use immunity), but not the exclusion of evidence that may have been discovered as a result of those statements (*i.e.*, derivative use). The witness in *Counselman* was granted immunity under the Act, but he still refused to testify before a federal grand jury and was held in contempt of court. *Kastigar*, 406 U. S., at 450. The *Counselman* Court approved of immunity as a valid means of supplanting the privilege, but because the statute in question "would permit the use against the immunized witness of evidence derived from his compelled testimony, it did not protect the witness to the same extent that a claim of the privilege would protect him," this Court held the statute unconstitutional. *Ibid.* ("the scope of the grant of immunity [must be] coextensive with the scope of the privilege").

The *Counselman* decision led to a new Congressional immunity statute — the Compulsory Testimony Act of 1893. *Id.*, at 451. The new Act granted "transactional" immunity upon which many federal immunity statutes were later based. *Id.*, at 452. Brushing aside precedents, "*Counselman* established an extraordinarily sweeping form of immunity that . . . [i]n effect . . . prevented a suspect who had been made to sing pretrial from being a witness against himself 'in any criminal case' by preventing him from being a defendant . . . ." Amar & Lettow, Fifth Amendment First Principles:

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3. Congress amended the Immunity Act again in 1868 to extend the Congressional hearings immunity to witnesses testifying at judicial proceedings. McMahon, *supra*, at 318, and n. 24.

The Self-Incrimination Clause, 93 Mich. L. Rev. 857, 875-876 (1995).

Even though this broad form of transactional immunity prevented witnesses from being federally prosecuted, dual sovereignty did not prevent prosecution under state law because the Self-Incrimination Clause did not yet apply to the states. *Id.*, at 876, and n. 70. Furthermore, not only could a witness be subject to state prosecution, but the federally compelled statements could be utilized against the defendant in the state case. See *United States* v. *Murdock*, 284 U. S. 141, 149 (1931).

In 1964, this Court decided two cases on the same day that set in motion the current state of the use and derivative use immunity doctrine. *Malloy* v. *Hogan*, 378 U. S. 1 (1964), held that the Self-Incrimination Clause is binding on the states through the Due Process Clause of the Fourteenth Amendment. Because it was held to be binding, *Murphy*, 378 U. S., at 79, held that "a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." Thus, the *Murphy* Court narrowed the scope of immunity in the dual sovereignty context. However, by continuing to exclude "fruits," the interpretation of the Fifth Amendment remained broader than protection against compulsion "to be a witness."

Congress again followed suit, and in 1970 it enacted the Organized Crime Control Act which rejected full transactional immunity from prosecution and instead only prohibited the use of compelled testimony and any evidence derived from that testimony. *Kastigar*, 406 U. S., at 452; McMahon, 18 Cath. Law., at 324. The petitioners in *Kastigar* challenged the constitutionality

of the newly enacted federal statute. The question presented was whether the federal government could compel testimony from an unwilling witness if the government was prohibited from using the compelled statement and its "fruit" (evidence derived from those statements) in an ensuing criminal case. *Kastigar*, *supra*, at 442.

The *Kastigar* Court answered this question in the affirmative, holding that the use and derivative use immunity standard "leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it." *Id.*, at 462. In so holding, this Court renewed the heavy burden of proof on the government that it set forth in *Murphy*. *Id.*, at 460. Specifically, the government has an affirmative duty to prove that its evidence against the defendant comes from "legitimate independent sources." *Id.*, at 461; *Murphy*, 378 U. S., at 79, n. 18.

B. Compelled incriminating statements made by government employees.

In the interval between *Malloy/Murphy* and *Kastigar*, this Court decided a series of cases involving incriminating statements made by public employees under the threat of job termination in response to questions by their employers regarding their job performance.

In *Garrity* v. *New Jersey*, 385 U. S. 493, 500 (1967), this Court held that incriminating statements made by public employees under threat of losing their job if they refuse to answer are "compelled" for purposes of the Self-Incrimination Clause and cannot be used against that employee in a subsequent prosecution. In *Gardner* v. *Broderick*, 392 U. S. 273 (1968), and *Uniformed*

Sanitation Men Assn., Inc. v. *Commissioner of Sanitation of City of New York*, 392 U. S. 280 (1968), this Court held that although public employees can be terminated for refusing to answer questions relating to their job performance, they cannot be terminated for refusing to waive their Fifth Amendment right against compulsory self-incrimination. These three cases together dictate

> "that answers elicited upon the threat of the loss of employment are compelled and inadmissible in evidence. Hence, if answers are to be required in such circumstances States must offer to the witness whatever immunity is required to supplant the privilege and may not insist that the employee or contractor waive such immunity." *Lefkowitz*, 414 U. S., at 85.

The *Garrity* line of cases operate in tandem with *Kastigar* in that they immunize statements made by a public employee and place a significant burden on the prosecutorial use of those statements if a criminal case is subsequently commenced. Clymer, Compelled Statements From Police Officers and Garrity Immunity, 76 N. Y. U. L. Rev. 1309, 1320-1321 (2001).

II. Excluding the reliable non-testimonial physical "fruit" of a compelled statement is inconsistent with this Court's recent interpretation of "witness" as that term is used in the Bill of Rights.

In *Crawford* v. *Washington*, 541 U. S. 36 (2004), this Court overruled decades-old precedent on the Confrontation Clause of the Sixth Amendment, focusing on the word "witness" in that amendment and the historical background. Unless the word "witness" means very different things in two amendments to the Constitution

proposed and ratified as part of the same package, a reexamination of what it means "to be a witness" under the Fifth Amendment is also in order.

Kastigar enunciated the standard that a person need not be totally immune from prosecution to comply with the Self-Incrimination Clause, but rather only the compelled statements and any "fruit" obtained via those compelled statements cannot be introduced as evidence against the accused. If the accused is prosecuted, the government has the burden to prove that the evidence against him or her came from a legitimate independent source. This standard places a nearly insurmountable barrier for the government to hurdle in some cases.

The rationale behind excluding the statements and their fruit is to place the witness in the position as if he had claimed the privilege, and the exclusion of the statements and its fruit was held to be coextensive with that right. See *Kastigar* v. *United States*, 406 U. S. 441, 462 (1972). An incriminating statement made by a public employee under threat of job termination regarding his job performance is arguably testimonial because it may be " '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " *Crawford*, 541 U. S., at 51 (quoting 1 N. Webster, An American Dictionary of the English Language (1828)). However, use of any incriminating non-testimonial physical evidence collected out of court as a result of those compelled statements does not make the defendant a "witness" as that term is now understood. "A witness testifies but physical evidence does not. A thing is not a witness." Amar & Lettow, Fifth Amendment First Principles: The Self-Incrimination Clause, 93 Mich. L. Rev. 857, 900 (1995).

If a public employee invokes the privilege and chooses not to respond to questioning, under *Garrity* v.

New Jersey, 385 U. S. 493 (1967), he could be terminated without running afoul of privilege against self-incrimination. In that situation, there would be no compelled statements and thus none would exist to be used "against" him later on. However, the "fruit" would exist because it grew independent of the statements given or not given by the accused. Forcing the prosecution to prove that the "fruit" was picked from a totally independent tree is a heavy burden and is inconsistent with what it means to be a "witness."

In *Schmerber* v. *California*, 384 U. S. 757, 761 (1966), this Court was asked to decide if the results of a blood alcohol test that was drawn over the defendant's objection and admitted into evidence against him violated his privilege against self-incrimination. *Id.*, at 760-761. There was no question that the blood test was "compelled" for purposes of the privilege. *Id.*, at 761. The question this Court addressed was whether the defendant was "compelled 'to be a witness against himself.' " *Ibid.* This Court answered that question in the negative. The privilege prohibits compelling "communications" or "testimony." *Id.*, at 765. Because "the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds." *Ibid.*

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U. S. Const., Amend. VI. In *Crawford* v. *Washington*, this Court addressed what a "witness against" means for purposes of the Confrontation Clause. A "witness" is someone who "bears testimony." 541 U. S., at 51. This applies to both in-court witnesses who take the stand and to out-

of-court statements made or gathered out of court with a "testimonial purpose" and introduced at trial.

No precedent of this Court suggests that a defendant has a constitutional right under the Confrontation Clause to confront and cross-examine a person who gave a statement, testimonial or not, that is not introduced at trial but merely led police to discover the location of physical evidence or the identity of a witness who does testify. Thus, if a "witness" is someone who provides testimony, then excluding a defendant's compelled statements is permissible, but the suppression or exclusion of any nontestimonial physical fruit obtained as a result of those statements is broader than the privilege requires.

III. Neither investigation, initiation of prosecution, nor introduction of "fruits" violates the Fifth Amendment.

Respondent complains that his statements were used "to locate additional evidence." Brief in Opposition 3. The Fifth Amendment right is a trial right, and nothing that happens before there is a criminal case can be a violation of that right, though of course other constitutional protections may be involved. See *Chavez* v. *Martinez*, 538 U. S. 760, 772-774 (2003). He further complains that his statements and the additional evidence resulted in the initiation of criminal proceedings. Brief in Opposition 3-4. Again, there is no Fifth Amendment violation as he had not at that point been "compelled in any criminal case to be a witness . . . ."

To the extent that respondent complains that the additional evidence was introduced in the probable cause hearing, Brief in Opposition 4, this is not a Fifth Amendment violation regardless of whether that hearing is part of a "criminal case." For the reasons

explained in Part II, *supra*, that evidence is not a "witness," and a person who merely gives information that enables authorities to locate evidence is not a "witness."

That leaves only the introduction of respondent's own allegedly compelled statements in evidence at the probable cause hearing. Petitioner argues that this was not a violation because the Self-Incrimination Clause applies only to trial, not to pretrial proceedings. See Brief for Petitioner 20. If this Court agrees, that resolves the case. Even if it does not, however, respondent's damages are no more than nominal. He prevailed in the hearing, so the introduction of this evidence caused him no harm.

CONCLUSION

The decision of the Court of Appeals for the Tenth Circuit should be reversed.

November, 2017

Respectfully submitted,

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No. 16-1495

IN THE
Supreme Court of the United States

CITY OF HAYS, KANSAS,
Petitioner,

v.

MATTHEW JACK DWIGHT VOGT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF CRIMINAL PROCEDURE SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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December 20, 2017

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE TEXT, STRUCTURE, AND DRAFTING HISTORY OF THE CONSTITUTION DEMONSTRATE THAT THE SELF-INCRIMINATION CLAUSE IS VIOLATED WHEN COERCED, INCRIMINATING STATEMENTS ARE INTRODUCED AT PRE-TRIAL PROBABLE CAUSE HEARINGS	4
II. THE HISTORICAL PRACTICE AT THE TIME OF THE FOUNDING CONFIRMS THAT THE SELF-INCRIMINATION CLAUSE IS VIOLATED WHEN COERCED, INCRIMINATING STATEMENTS ARE INTRODUCED AT PRE-TRIAL PROBABLE CAUSE HEARINGS	21
CONCLUSION	26

TABLE OF AUTHORITIES

Page(s)

Cases

Abney v. United States,
431 U.S. 651 (1977) 7

Barber v. Page,
390 U.S. 719 (1968) 20

Blyew v. United States,
80 U.S. (13 Wall.) 581 (1871) 5

Brown v. Walker,
161 U.S. 591 (1896) 20

Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.,
492 U.S. 257 (1989) 14

Chavez v. Martinez,
538 U.S. 760 (2003) 2, 15

Coleman v. Alabama,
399 U.S. 1 (1970) 10

Counselman v. Hitchcock,
142 U.S. 547 (1892) 8, 9

Crawford v. Washington,
541 U.S. 36 (2004) 16, 18, 19, 22, 23

Davis v. Washington,
547 U.S. 813 (2006) 19

Doe v. United States,
487 U.S. 201 (1988) 3, 22

Ferguson v. Georgia,
365 U.S. 570 (1961) 23

TABLE OF AUTHORITIES – cont'd

Page(s)

Gerstein v. Pugh,
420 U.S. 103 (1975) 10

Hamilton v. Alabama,
368 U.S. 52 (1961) 10

Hiibel v. Sixth Judicial Dist. Court,
542 U.S. 177 (2004) 20

Lafler v. Cooper,
566 U.S. 156 (2012) 24

Melendez-Diaz v. Massachusetts,
557 U.S. 305 (2009) 18-19

Michigan v. Bryant,
562 U.S. 344 (2011) 18

Michigan v. Tucker,
417 U.S. 433 (1974) 21-22

Mitchell v. United States,
526 U.S. 314 (1999) 4, 5

Murphy v. Waterfront Comm'n,
378 U.S. 52 (1964) 23

Ohio v. Clark,
135 S. Ct. 2173 (2015) 18

Peterson v. California,
604 F.3d 1166 (9th Cir. 2010) 10

Powell v. Alabama,
287 U.S. 45 (1932) 10

Price v. Georgia,
398 U.S. 323 (1970) 7

TABLE OF AUTHORITIES – cont'd

Page(s)

Ratzlaf v. United States,
510 U.S. 135 (1994) 5

Rothgery v. Gillespie Cty.,
554 U.S. 191 (2008) 9

Ullmann v. United States,
350 U.S. 422 (1956) 3, 21, 22, 25

United States v. Balsys,
524 U.S. 666 (1998) 8-9

United States v. Burr,
25 F. Cas. 38 (C.C. D. Va. 1807) (No. 14,692E) 20

United States v. Gouveia,
467 U.S. 180 (1984) 9

United States v. Hubbell,
530 U.S. 27 (2000) 19-20

United States v. MacDonald,
456 U.S. 1 (1982) 9

United States v. Mandujano,
425 U.S. 564 (1976) 10

United States v. Marion,
404 U.S. 307 (1971) 8, 9

United States v. Williams,
504 U.S. 36 (1992) 9-10

Whitmore v. Arkansas,
495 U.S. 149 (1990) 6

TABLE OF AUTHORITIES – cont'd

Page(s)

Constitutional Provisions and Legislative Materials

U.S. Const. art. I, § 6 6

U.S. Const. art. III, § 2 5-6

U.S. Const. amend. V ..... *passim*

U.S. Const. amend. VI 6, 8, 9

U.S. Const. amend. VII 6

Del. Declaration of Rights of 1776, art. 15 12

Md. Const. of 1776, Declaration of Rights, art. XX 12

Va. Declaration of Rights of 1776, § 8 11-12

An Act appointing an Order to Justices of Peace for the Bailement of Prisoners, 1 & 2 Phil. & M., ch. 13, § 1 (1554) (Eng.) .. 22

An Acte to take the Examination of Prysoners suspected of Manslaughter or Felonye, 2 & 3 Phil. & M., ch. 10, § 1 (1555) (Eng.) 22

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Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747 (1999) 5

TABLE OF AUTHORITIES – cont'd

Page(s)

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Thea A. Cohen, Note, *Self-Incrimination and Separation of Powers*, 100 Geo. L.J. 895 (2012) 6

Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 Tenn. L. Rev. 987 (2003) 7, 10-11, 14

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Edward Dumbauld, *The Bill of Rights and What It Means Today* (1957) 14

Geoffrey Gilbert, *Law of Evidence* (3rd ed., London, His Majesty's Printers 1769) (1754) 17

2 Matthew Hale, *History of the Pleas of the Crown* (Sollom Emlyn rev. ed., London, E. Rider 1800) (1736) 16, 23

TABLE OF AUTHORITIES – cont'd

Page(s)

2 William Hawkins, *A Treatise of the Pleas of the Crown* (4th ed., London, E. Richardson and C. Lintot 1762) (1716) 16-17, 24-25

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Leonard W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* (Ivan R. Dee 1999) (1968) 11, 12, 13, 14

Tracey Maclin, *The Prophylactic Fifth Amendment*, 97 B.U. L. Rev. 1047 (2017). 9

James Madison, Speech to the House of Representatives (June 8, 1789) 13

Michael J. Zydney Mannheimer, *Ripeness of Self-Incrimination Clause Disputes*, 95 J. Crim. L. & Criminology 1261 (2005) 11

Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 Mich. L. Rev. 1086 (1994) 13

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Page(s)

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2 Webster's An American Dictionary of the English Language (1st ed. 1828)..... 15

INTEREST OF *AMICI CURIAE*[1]

Amici are scholars of criminal procedure, each of whom has published a book or law review article in this area. *Amici* law professors also teach or have taught courses in constitutional law or criminal procedure and have devoted significant attention to studying the Fifth Amendment's Self-Incrimination Clause:

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

Waugh, Sr. Distinguished Scholar, Rutgers University School of Law[2]

SUMMARY OF ARGUMENT

The Self-Incrimination Clause provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In *Chavez v. Martinez*, this Court held that even if a person is coerced into making incriminating statements, the Clause is not violated if those statements are never used in any part of a "criminal case." 538 U.S. 760, 766 (2003) (plurality opinion). This case raises an important question left unanswered by *Chavez*: when does a "criminal case" commence?

Here, respondent Matthew Vogt was formally charged in Kansas state court with two felony counts, and the government introduced allegedly coerced and incriminating statements as evidence against him at a probable cause hearing. *See* Pet. App. 3a-4a; Resp. Br. 6. As a result, Vogt's rights under the Self-Incrimination Clause were violated because—as the text, structure, and history of the Constitution all make clear—a probable cause hearing after formal charges are brought is plainly part of a "criminal case."

To start, as Founding-era usage reflects, the broad phrase "any criminal case" plainly includes pre-trial probable cause hearings. This definition also comports with other uses of the term "case" in the Constitution. For example, Article III uses the term "Case" to refer to proceedings over which a court has jurisdiction, and the Grand Jury Clause uses the term "case" in the context of describing how legal proceedings may be initiated. Moreover, the use of the term "criminal case"

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[2] Institution names are provided for purposes of affiliation only.

contrasts notably with the Sixth Amendment's use of the narrower term "criminal prosecution."

The use of this broad language is consistent with the Self-Incrimination Clause's placement in the Fifth Amendment, which includes other rights related to the initiation of criminal proceedings, rather than in the Sixth Amendment, which focuses on the legal protections that apply once a criminal prosecution has begun. Indeed, the drafting history of the Bill of Rights confirms that the decision to include the Clause in the Fifth Amendment, and to use the broad "in any criminal case" language, was a considered one on the part of the Bill of Rights' Framers.

Finally, narrowly construing the scope of the Clause would not only be at odds with its plain text, it would also be at odds with the historical foundations of the privilege. As this Court has recognized, the privilege was a reaction against "putting the accused upon his oath and compelling him to answer questions," *Doe v. United States*, 487 U.S. 201, 212 (1988), reflecting the Founders' rejection of the notion that "the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused," *Ullmann v. United States*, 350 U.S. 422, 501 (1956) (quoting *Maffie v. United States*, 209 F.2d 225, 227 (1st Cir. 1954)). Using coerced statements at a pre-trial probable cause hearing violates that principle no less than using them at trial.

For all these reasons, a "criminal case" includes a pre-trial probable cause hearing, and this Court should hold that the use of coerced and incriminating testimony at such a proceeding violates the Self-Incrimination Clause.

ARGUMENT

I. THE TEXT, STRUCTURE, AND DRAFTING HISTORY OF THE CONSTITUTION DEMONSTRATE THAT THE SELF-INCRIMINATION CLAUSE IS VIOLATED WHEN COERCED, INCRIMINATING STATEMENTS ARE INTRODUCED AT PRE-TRIAL PROBABLE CAUSE HEARINGS.

1. The Fifth Amendment to the Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. As this Court has long recognized, this Amendment is violated when compelled statements are used "in any criminal case." *Mitchell v. United States*, 526 U.S. 314, 327 (1999). The term "criminal case" plainly includes pre-trial probable cause hearings that occur after formal charges are brought.

When the Fifth Amendment was adopted, the term "criminal case" was commonly understood to encompass proceedings that occurred before the beginning of a trial. Noah Webster's 1828 American Dictionary of the English Language, for example, defines "case" to include "[a] cause or suit in court." *Case*, 1 Webster's An American Dictionary of the English Language (1st ed. 1828) [hereinafter "Webster's American Dictionary"].[3] A "suit in court" plainly begins before there is a trial. Webster's dictionary goes on to say

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[3] The only other definition of "case" in Webster's 1828 dictionary that pertains to the law is "[a] question; the state of facts involving a question for discussion or decision; as, the lawyer stated the *case*." *Id.* Though this definition is probably not the one the Founders had in mind when they used the word "case" in the Fifth Amendment, it is in any event a similarly broad definition that is not limited to trials alone.

that "*case* is nearly synonymous with cause, whose primary sense is nearly the same." *Id.* "Cause" in turn is defined as "[a] suit or action in court; any legal process which a party institutes to obtain his demand, or by which he seeks his right or his supposed right." *Cause*, 1 Webster's American Dictionary, *supra*. This broad definition of "cause" to include any "action in court . . . which a party institutes" clearly includes all aspects of a legal proceeding, not a trial alone. *See Blyew v. United States*, 80 U.S. (13 Wall.) 581, 595 (1871) ("The words 'case' and 'cause' are constantly used as synonyms in statutes and judicial decisions, each meaning a proceeding in court, a suit, or action," and "no court can have jurisdiction of either a case or a cause until *it is presented in the form of an action*." (emphasis added)). Indeed, were it otherwise, an action which settles before trial would not be a "case" at all—an outcome that would be "contrary to the law and to common sense," *Mitchell*, 526 U.S. at 327 (holding that the Self-Incrimination Clause applies at sentencing).

Importantly, interpreting "case" to include pretrial probable cause hearings comports with other uses of the word "case" in the Constitution. *See* Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 791 (1999) (interpreters should "us[e] the Constitution as a dictionary"); *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places . . . is generally read the same way each time it appears."). Article III, for example, provides that

> [t]he judicial Power shall extend to all *Cases*, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all *Cases* affecting Ambassadors, other public Ministers and Consuls;—

> [and] to all *Cases* of admiralty and maritime Jurisdiction.

U.S. Const. art. III, § 2 (emphases added). "Case" in this context refers to proceedings over which the judicial power extends; in other words, cases over which an Article III court has jurisdiction, and "Article III judges preside over many types of judicial proceedings, including bail hearings, competency hearings, and probable cause hearings," Thea A. Cohen, Note, *Self-Incrimination and Separation of Powers*, 100 Geo. L.J. 895, 897 (2012); *see Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("Article III . . . gives the federal courts jurisdiction over only 'cases and controversies,' and the doctrine of standing serves to identify those *disputes* which are appropriately resolved through *the judicial process*." (emphasis added)). And significantly, the only other use of the term in the Bill of Rights explicitly refers to a pre-trial proceeding: the Grand Jury Clause in the Fifth Amendment requires an indictment by a Grand Jury "except in *cases* arising in the land or naval forces." U.S. Const. amend. V (emphasis added).[4]

Finally, it is notable that the drafters of the Bill of Rights used the term "trial" in other Amendments, but nonetheless used the broader word "case" in the Self-Incrimination Clause. The Sixth Amendment demands "a speedy and public *trial*" in all criminal prosecutions, U.S. Const. amend. VI (emphasis added), while the Seventh Amendment ensures that "the right of *trial* by jury shall be preserved," *id.* amend. VII

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[4] The only other reference to "Case" in the Constitution that is possibly legal also uses the word to refer to the initiation of legal proceedings, not a trial. *See* U.S. Const. art. I, § 6 (Senators and Representatives "shall in all *Cases*, except Treason, Felony and Breach of the Peace, be privileged from Arrest.").

(emphasis added). "If the Framers had meant to restrict the [Self-Incrimination Clause] to 'trial,' they could have said so." Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 Tenn. L. Rev. 987, 1014 (2003). Instead, they used the capacious term "criminal case."

2. This interpretation of "case" to include pre-trial probable cause hearings is not only consistent with the Amendment's plain text, it also makes sense in light of the placement of the Self-Incrimination Clause in the Fifth rather than the Sixth Amendment.

The Self-Incrimination Clause appears in the Fifth Amendment alongside other rights that govern when and how criminal proceedings may be brought. For instance, the Amendment lists the right not to be charged with a crime "unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. The Grand Jury Clause sets out a prerequisite to bringing an indictment, and thus is violated at the time of indictment, not at trial. The Fifth Amendment also sets forth the right not to "be subject for the same offense to be twice put in jeopardy of life or limb." *Id.* The Double Jeopardy Clause similarly prohibits the government from *indicting* a defendant a second time for the same crime. "The prohibition is not against being twice punished, but against being twice put in jeopardy." *Price v. Georgia*, 398 U.S. 323, 326 (1970) (quoting *United States v. Ball*, 163 U.S. 662, 669 (1896)); *see Abney v. United States*, 431 U.S. 651, 659 (1977) (allowing interlocutory appeal of *pretrial* motion seeking to dismiss an indictment on double jeopardy grounds).

In short, the privilege against self-incrimination appears with other Fifth Amendment rights that govern when the government can bring criminal

proceedings—rights that necessarily can be violated pre-trial. The Fifth Amendment's Self-Incrimination Clause is no different. *Cf. United States v. Balsys*, 524 U.S. 666, 673 (1998) (holding that the Fifth Amendment's reference to "criminal case" does not include foreign criminal prosecutions because the privilege appears "in the company of guarantees of grand jury proceedings, defense against double jeopardy, due process, and compensation for property taking," and "none of these provisions is implicated except by action of the government that it binds").

If the Self-Incrimination Clause could be violated only when compelled statements are used at trial, it would have made far more sense to include it in the Sixth Amendment. That Amendment "[o]n its face . . . is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution." *United States v. Marion*, 404 U.S. 307, 313 (1971). Notably, the Sixth Amendment differs from the Fifth Amendment in two important respects. First, the Fifth Amendment applies broadly to "person[s]," U.S. Const. amend. V, rather than simply "the accused," *id.* amend. VI, suggesting that it—unlike the Sixth Amendment—is not limited to the period after formal charges are brought. Second, the Fifth Amendment applies to "any criminal case," *id.* amend. V, rather than to "all criminal prosecutions," *id.* amend. VI.

As this Court has explained, "[a] criminal prosecution under article 6 of the amendments is much narrower than a 'criminal case,' under article 5 of the amendments." *Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892), *overruled in part on other grounds, Kastigar v. United States*, 406 U.S. 441 (1972); *see Balsys*, 524 U.S. at 672 (noting "the textual contrast between the Sixth Amendment . . . and the Compelled

Self-Incrimination Clause, with its facially broader reference to 'any criminal case'"); *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 222 (2008) (Thomas, J., dissenting) (finding it "significant that the Framers used the words 'criminal prosecutions' in the Sixth Amendment rather than some other formulation such as . . . 'criminal cases'" and noting that "the difference in phraseology was not accidental"). A criminal "prosecution" commences once "adversary judicial proceedings ha[ve] been initiated." *United States v. Gouveia*, 467 U.S. 180, 192 (1984); *see generally Counselman*, 142 U.S. at 563 (Sixth Amendment applies in "a criminal prosecution against a person who is accused and who is to be tried by a petit jury.").

Given these textual differences, it makes sense that the Sixth Amendment's focus is on "procedural rights of the criminally accused after indictment." Tracey Maclin, *The Prophylactic Fifth Amendment*, 97 B.U. L. Rev. 1047, 1062 (2017). First, the Amendment guarantees "a speedy and public trial," U.S. Const. amend. VI, a right which this Court has held applies only after "some charge or arrest" in a criminal prosecution, *Marion*, 404 U.S. at 319 (quoting Note, *The Right to a Speedy Trial*, 57 Colum. L. Rev. 846, 848 (1957)); *see United States v. MacDonald*, 456 U.S. 1, 6-7 (1982) ("[N]o Sixth Amendment right to a speedy trial arises until charges are pending."). Similarly, the Amendment guarantees the right to "an impartial jury," U.S. Const. amend. VI, which by definition applies during jury selection and trial.

The Sixth Amendment also guarantees the right "to be confronted with the witnesses against [the accused]" and the right to "have compulsory process for obtaining witnesses in his favor," *id.*—protections that courts have recognized most clearly apply after the initiation of a criminal prosecution. *See United States v.*

Williams, 504 U.S. 36, 52 (1992) (rejecting argument that target of a grand jury investigation may "tender his own defense"); *see also Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) (probable cause hearing need not be "accompanied by the full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses," that must be present at trial); *Peterson v. California*, 604 F.3d 1166, 1169-70 (9th Cir. 2010) (finding no right to confront witnesses at a preliminary hearing and collecting cases).

To be sure, as the United States notes, "[s]ome Sixth Amendment rights attach and apply before trial." U.S. Br. 25. The Sixth Amendment right to counsel, for example, extends to every "critical stage" in a criminal prosecution, *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961); *see, e.g.*, *Coleman v. Alabama*, 399 U.S. 1, 10 (1970) (Sixth Amendment right to counsel applies at preliminary hearing to determine whether there was sufficient evidence against the accused and to fix bail); *Powell v. Alabama*, 287 U.S. 45, 57 (1932) (Sixth Amendment right to counsel exists "from the time of their arraignment until the beginning of their trial"). But, significantly, there is no right to counsel before a criminal prosecution begins—for instance, before a grand jury or during an initial probable cause hearing. *See United States v. Mandujano*, 425 U.S. 564, 581 (1976) (plurality opinion) ("Under settled principles the witness may not insist upon the presence of his attorney in the grand jury room."); *Gerstein*, 420 U.S. at 122 (finding no right to counsel at probable cause determination to justify pretrial custody). The Fifth Amendment, by contrast, applies more broadly to "any criminal case."

In short, "the right against compelled self-accusation is in the wrong amendment to be a 'trial right.'"

Davies, *Farther and Farther*, *supra*, at 1009; *see* Michael J. Zydney Mannheimer, *Ripeness of Self-Incrimination Clause Disputes*, 95 J. Crim. L. & Criminology 1261, 1322 (2005) ("It appears that the placement of the Self-Incrimination Clause in the Fifth Amendment rather than the Sixth signifies that a 'criminal case' can exist before a 'criminal prosecution[]' commences."); Leonard W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* 427 (Ivan R. Dee 1999) (1968) ("[T]he location of the self-incrimination clause in the Fifth Amendment rather than the Sixth proves that the [Framers] did not intend to restrict that clause to the criminal defendant only nor only to his trial.").

3. In addition to the text and structure of the Constitution, the history of the Fifth Amendment's drafting suggests that the Founders intended for the term "criminal case" to apply broadly, including at proceedings like the pre-trial probable cause hearing at issue here.

The inclusion of the Self-Incrimination Clause in the Fifth Amendment rather than in the Sixth Amendment—and its application in "any criminal case" rather than in a "criminal prosecution"—appears to have been no accident. The Bill of Rights was largely modeled on state constitutional provisions, particularly Section 8 of the Virginia Declaration of Rights. *See id.* at 409 ("Section 8 . . . became a model for other states and for the United States Bill of Rights."). Section 8 of Virginia's constitution included a privilege against self-incrimination. The Section read in full:

> That in all capital or criminal prosecutions a man has a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an

> impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; *nor can he be compelled to give evidence against himself*; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.

Va. Declaration of Rights of 1776, § 8 (emphasis added). The Virginia privilege against self-incrimination therefore appeared amidst the prosecution-focused rights that later made their way into the Sixth Amendment. In addition, the Virginia Declaration of Rights articulated a narrower privilege than the Fifth Amendment's Self-Incrimination Clause, limiting its reach to "capital or criminal prosecutions."

This more limited right in Virginia's Declaration of Rights contrasted with similar rights in other state constitutions at the time. For instance, Delaware—which also modeled its bill of rights on Virginia's—"introduced a subtle but crucial change by making [the privilege] an independent section instead of inserting it among the enumerated rights of the criminally accused." Levy, *supra*, at 409. Moreover, Delaware altered the language to read: "That no Man in the Courts of common Law ought to be compelled to give Evidence against himself." Del. Declaration of Rights of 1776, art. 15. Unlike Virginia, Delaware's privilege extended to "Courts of common Law," not merely criminal prosecutions. Maryland similarly adopted a broader provision, declaring that "no man ought to be compelled to give evidence against himself, *in a common court of law, or in any other court*." Md. Const. of 1776, Declaration of Rights, art. XX (emphasis added).

As the First Congress considered a federal Bill of Rights, New York, North Carolina, and Rhode Island all sent proposals for a Bill of Rights that included a privilege against self-incrimination that mirrored

Virginia's formulation of the right—listed with other prosecution-focused rights and limited to a criminal prosecution. *See* Levy, *supra*, at 420-21. Rather than adopt that model, however, James Madison placed the self-incrimination clause as "part of a miscellaneous article" separate from what became the Sixth Amendment. *Id.* at 422; *see* Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 Mich. L. Rev. 1086, 1122 (1994) ("Madison proposed an article containing a series of guarantees surrounding jury trial as well as a more general article concerning judicial process."). That miscellaneous article—which later became the Fifth Amendment, read:

> No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence; *nor shall be compelled to be a witness against himself*; nor be deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

1 Annals of Cong. 448, 451–52 (Madison) (1789) (Joseph Gales ed., 1790).[5] In addition to separating the

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[5] It is also noteworthy that in an early speech to the House of Representatives, Madison suggested inserting most of the provisions that later became separate Amendments into the limitations on the power of Congress in Article I, Section 9 of the Constitution. *See* James Madison, Speech to the House of Representatives (June 8, 1789), *in* 1 Annals of Cong. 448-59. In that proposal, Madison grouped the Self-Incrimination Clause in a paragraph with other now-Fifth Amendment rights rather than a different paragraph that compiled the "criminal prosecution[]" rights that later became the Sixth Amendment. *Id.* Later, the select committee that reviewed this proposal moved the paragraph of now-Sixth Amendment rights to a proposed revision to Article III, Section 2, but left the Self-Incrimination Clause

privilege from other trial-focused rights, Madison also used language that was notably more similar to Delaware's and Maryland's broader formulation of the right. By its plain terms, this version of the Clause "applied to civil as well as criminal proceedings and in principle to any stage of a legal inquiry, from the moment of arrest in a criminal case, to the swearing of a deposition in a civil one." Levy, *supra*, at 423.

As the Bill of Rights was being debated in the House of Representatives, however, Representative John Laurence of New York worried that "a general declaration" was "in some degree contrary to laws passed," and "he thought it ought to be confined to criminal cases." 1 Annals of Cong. 782. While it is not entirely clear what "laws passed" Representative Laurence may have been referencing, *compare* Levy, *supra*, at 425-26, *with* Davies, *Farther and Farther*, *supra*, at 1017 & n.141, what is clear is that his proposal to add "in any criminal case" was designed to limit the privilege against self-incrimination to criminal, not civil, cases, *see Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 294 (1989) (O'Connor, J., concurring in part and dissenting in part) (The Framers "decid[ed] to confine the benefits of the Self-Incrimination Clause of the Fifth Amendment to *criminal proceedings*." (emphasis added)). There is no evidence that the phrase "in any criminal case" was added to restrict the right to criminal *trials*. In short, the drafting history confirms that the placement of the Self-Incrimination Clause in the Fifth Amendment and its application to "any criminal case" rather than to a "criminal prosecution" was a considered choice on the part of the Founders.

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among other now-Fifth Amendment rights to be inserted into Article I. *See* Edward Dumbauld, *The Bill of Rights and What It Means Today* 210-12 (1957).

4. Ignoring the Self-Incrimination Clause's plain reference to "any criminal case," petitioner argues that the word "witness" in the Clause means that the Clause protects only against the use of compelled testimony at trial, even though a plurality of this Court has already suggested that the key to deciding the scope of the Clause is determining the meaning of the term "criminal case," not the term "witness." *See Chavez*, 538 U.S. at 767 (plurality opinion) (stating that the Self-Incrimination Clause is violated when compelled statements are "use[d] in a criminal case," but declining to decide "the precise moment when a 'criminal case' commences"). And, as previously discussed, the broad term "criminal case" clearly includes pre-trial probable cause hearings. In any event, petitioner offers no evidence to support its cramped reading of the term "witness," and the text, historical evidence, and this Court's precedents all refute it.

To start, the word "witness" plainly includes individuals who give testimony at pre-trial proceedings. Webster's 1828 Dictionary defines "witness" simply as "[o]ne who gives testimony." *Witness*, 2 Webster's American Dictionary, *supra*. "Testimony" in turn means "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact" and typically occurs "in judicial proceedings." *Testimony*, 2 Webster's American Dictionary, *supra*. An even earlier dictionary linked the definition of "witness" to the definition of "cause": a "witness" is "one that gives Evidence in a Cause." G. Jacob, *A New Law-Dictionary* 83 (6th ed., The Savoy, Henry Lintot 1750). Nowhere does either dictionary limit the terms "witness" or "testimony" to those who give testimony or evidence *at trial*.

The term "witness" was also routinely used at the Founding to describe an individual who gave

testimony during pre-trial proceedings. As this Court has explained, prior to the Founding, the English "Marian bail and committal statutes required justices of the peace to examine suspects *and witnesses* in felony cases" at pre-trial examinations, and to later "certify the results to the court." *Crawford v. Washington*, 541 U.S. 36, 44 (2004) (emphasis added). In many ways, Marian pre-trial committal and bail proceedings were the legal antecedents to the modern probable-cause hearing. *See* Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. Crim. L. & Criminology 933, 943 n.6 (2010).

It is notable, then, that legal treatises and manuals from before and at the time of the Founding consistently referred to individuals who testified before a justice of the peace pre-trial as "witnesses." In Sir Matthew Hale's famous treatise *History of the Pleas of the Crown*, first published in 1736, he explained that justices of the peace in pre-trial committal proceedings "ought to take the examinations of felons (without oath,) and the informations of accusers *or witness* (upon oath,) and return them to the justices of gaol-delivery." 2 Matthew Hale, *History of the Pleas of the Crown* 51-52 (Sollom Emlyn rev. ed., London, E. Rider 1800) (1736) (emphasis added).[6] Another leading treatise of the time, Sergeant William Hawkins's *Pleas of the Crown*, explained that before a witness's statement from a pre-trial proceeding could be introduced at trial, prosecutors must "make Oath that [they] have used all their Endeavours to find the Witness, but cannot find him." 2 William Hawkins, *A Treatise of the*

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[6] "Gaol" means "[a] prison; a place for the confinement of debtors and criminals." 1 Webster's American Dictionary, *supra*.

Pleas of the Crown 430 (4th ed., London, E. Richardson and C. Lintot 1762) (1716); *see* Geoffrey Gilbert, *Law of Evidence* 140 (3rd ed., London, His Majesty's Printers 1769) (1754) (stating that the examination of "a Witness examined before the Coroner" could be admitted at a later trial if the witness had died).

Richard Burn's justice of the peace manual similarly and repeatedly used the term "witness" to refer to individuals questioned in pre-trial examinations. *See* 1 Richard Burn, *The Justice of the Peace and Parish Officer* 760-63 (21st ed., London, A. Strahan 1810) (1755). In the "Examination" chapter—having to do with a pre-trial Marian examination—the manual states that testimony "of other witnesses, whom the justice may bring before him by his warrant" may be later "given in evidence against the party confessing." *Id.* at 760. He goes on to say that "if a quaker be witness, his affirmation must not be taken in this case" because Quakers would not take an oath. *Id.* Finally, the manual provides a template for recording the "[i]nformation of a witness" and for obtaining a "[w]arrant for a witness" to appear at a Marian pre-trial proceeding. *Id.* at 762-63.

By the same token, justice of the peace manuals used in American colonies around the time of the Founding used the term "witness" to refer to individuals giving testimony at Marian pre-trial examinations. *See, e.g.*, *The South-Carolina Justice of Peace* 165 (3rd ed., New York, T. & J. Swords 1810) ("[W]here [an accused] person is not bailed, but committed to ward, the justice or justices who commit him, shall, before such commitment, take the like examination and information, . . . and shall in like manner bind over the witnesses, and certify the whole as above."); James Parker, *Conductor Generalis: or the Office, Duty and Authority of Justices of the Peace* 174 (New Jersey, James

Parker 1764) (referring, in the chapter related to pre-trial examinations, to "other witnesses; whom the justice may bring before him by his warrant for th[e] purpose" of giving evidence); George Webb, *The Office and Authority of a Justice of Peace* 109 (photo. reprt. 1969) (Williamsburg, William Parks 1736) ("When any Person shall be taken for any Criminal Offence, and brought before a Justice of Peace, he is to examine the Prisoner, and Witnesses.").

Confirming this expansive understanding of the term "witness," this Court explained in *Crawford v. Washington* that "witness" for purposes of the Confrontation Clause broadly refers to "[a]n accuser who makes a formal statement to government officers." *Crawford*, 541 U.S. at 51.[7] Again and again since *Crawford*, this Court has referred to individuals who provide testimony pre-trial—and sometimes even before judicial proceedings begin at all—as "witnesses" providing "testimony." *See, e.g.*, *Ohio v. Clark*, 135 S. Ct. 2173, 2179 (2015) (referring to "statements by a witness during police questioning at the station house"); *Michigan v. Bryant*, 562 U.S. 344, 355 (2011) (noting that some but "not all those questioned by the police are witnesses"); *Melendez-Diaz v.*

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[7] This Court's opinion in *Crawford* repeatedly uses the word "witness" to refer to individuals who gave testimony at pre-trial proceedings. *See, e.g.*, *Crawford*, 541 U.S. at 43 ("Justices of the peace or other officials examined suspects *and witnesses before trial*." (emphasis added)); *id.* at 44 (noting that "treason statutes required *witnesses* to confront the accused 'face to face' at his arraignment" (emphasis added)); *id.* at 52 (referring to "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" (quoting Br. for Nat'l Ass'n of Crim. Def. Lawyers, et al. as *Amici Curiae* 3)); *id.* ("Under the Marian statutes, witnesses were typically put on oath, but suspects were not.").

Massachusetts, 557 U.S. 305, 309 (2009) ("A witness's testimony against a defendant is . . . inadmissible unless the witness appears at trial."); *Davis v. Washington*, 547 U.S. 813, 826-27 (2006) ("The product of [an] interrogation [by a law enforcement officer], whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial.").

Petitioner is correct of course that the Sixth Amendment's Confrontation and Compulsory Process Clauses—both of which use the word "witness"—protect rights within the context of a criminal prosecution and may not apply at certain pre-trial proceedings. *See* Pet'r Br. 22. But they are wrong that this limitation exists because the Sixth Amendment uses the word "witness." After all, the term "witness" includes even "[s]tatements taken by police officers in the course of interrogations," which are "testimonial under even a narrow standard." *Crawford*, 541 U.S. at 52. Rather, the Sixth Amendment's scope is limited by its use of the terms "criminal prosecution" and "the accused." *See supra* at 8-9; Resp. Br. 24-25. To equate the scope of the Self-Incrimination Clause and the Confrontation Clause simply because both use the term "witness" would be like equating diamonds and coal simply because both contain carbon.

The United States, for its part, argues that the phrase "a witness against himself" means that the Self-Incrimination Clause is only violated when a compelled statement is introduced to "establish a defendant's criminal responsibility—his guilt and his punishment"—and that this can take place only at trial. U.S. Br. 10-11. But nothing about the phrase "a witness against himself" requires this reading. As detailed above, "the word 'witness' in the constitutional text limits the relevant category of compelled

incriminating communications to those that are 'testimonial' in character," *United States v. Hubbell*, 530 U.S. 27, 34 (2000), not to testimonial statements at trial. And to be a witness "against oneself" simply means that a person's testimony must be incriminating. *See Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189 (2004) (noting that the Clause prohibits the use of statements that are "testimonial, incriminating, and compelled"). A statement is incriminating when the "danger to be apprehended" is "real and appreciable, with reference to the ordinary operation of law in the ordinary course of things." *Brown v. Walker*, 161 U.S. 591, 599 (1896). Indeed, at the time of the Founding, "incriminate" meant "[t]o accuse; to charge with a crime or fault," *Incriminate*, 1 Webster's American Dictionary, *supra*, not to find one guilty at trial. *See United States v. Burr*, 25 F. Cas. 38, 40 (C.C.D. Va. 1807) (No. 14,692E) (C.J. Marshall, presiding) ("[E]very witness is privileged not *to accuse* himself." (emphasis added)). Thus, a statement is incriminating if it presents an appreciable danger of apprehension—a standard easily met when a statement is used at a pre-trial probable cause hearing. The United States fails to explain why a statement could be incriminating only at trial, and that view is refuted by this Court's precedents.

In any event, even if the United States were correct that the use of a coerced statement must somehow "expose a defendant to the risk of conviction or punishment," U.S. Br. 11, the probable cause hearing at issue here certainly clears that hurdle. As this Court has noted, a preliminary hearing is simply a "less searching exploration into the merits of a case than a trial" to determine "whether probable cause exists to hold the accused for trial." *Barber v. Page*, 390 U.S. 719, 725 (1968); Resp. Br. 17 n.4. Such an inquiry, then,

surely "expose[s] a defendant to the risk of conviction or punishment" insofar as a finding of probable cause is a necessary, even if not sufficient, step on the path to conviction and punishment. In short, the language of the Self-Incrimination Clause giving every person the right not to be a "witness against himself" readily encompasses the use of coerced and incriminating statements at a pre-trial probable cause hearing.

* * *

In sum, the plain text of the Self-Incrimination Clause, in conjunction with the structure of the Bill of Rights and the history of its drafting, make clear that a "criminal case" includes pre-trial probable cause hearings such as the one at issue here. As the next Section discusses, construing the Clause more narrowly would not only be at odds with the Constitution's text and structure, but also with historical practice at the time of the Founding.

II. THE HISTORICAL PRACTICE AT THE TIME OF THE FOUNDING CONFIRMS THAT THE SELF-INCRIMINATION CLAUSE IS VIOLATED WHEN COERCED, INCRIMINATING STATEMENTS ARE INTRODUCED AT PRE-TRIAL PROBABLE CAUSE HEARINGS.

The privilege against self-incrimination "registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.'" *Ullmann*, 350 U.S. at 426 (quoting Erwin N. Griswold, *The Fifth Amendment Today* 7 (1955)).

As this Court has explained, the Self-Incrimination Clause was "developed by painful opposition to a course of ecclesiastical inquisitions and Star Chamber

proceedings occurring several centuries ago." *Michigan v. Tucker*, 417 U.S. 433, 440 (1974). Indeed, as late as the Founding, pre-trial practice was still in many ways "designed to induce the accused to bear witness against himself promptly." John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich. L. Rev. 1047, 1061 (1994). Most prominently, the colonies continued to hold procedures like those first described in the English Marian Bail and Committal Statutes of 1554 and 1555. Under those laws, a justice of the peace was required to "take the examination" of an accused individual promptly after the defendant was apprehended. *See* An Acte to take the Examination of Prysoners suspected of Manslaughter or Felonye, 2 & 3 Phil. & M., ch. 10, § 1 (1555) (Eng.) (committal statute). The statute required a justice of the peace to "put in writing" anything the accused person said that was "material to prove the Felony," *id.*, and to "transmit this document to the trial court, where it could be used in evidence against the accused," Langbein, *Privilege Against Self-Incrimination*, *supra*, at 1060; *see Crawford*, 541 U.S. at 44; *see also* An Act appointing an Order to Justices of Peace for the Bailement of Prisoners, 1 & 2 Phil. & M., ch. 13, § 1 (1554) (Eng.) (authorizing justices of the peace to obtain incriminating statements from suspects at pre-trial interrogations).

The Self-Incrimination Clause was a reaction against "putting the accused upon his oath and compelling him to answer questions" in these pre-trial interrogations, *Doe*, 487 U.S. at 212, reflecting the Founders' rejection of the notion that "the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused," *Ullmann*, 350 U.S. at 501 (quoting *Maffie*, 209 F.2d at 227). By the time of the Founding,

justices of the peace were prohibited from questioning an arrestee *under oath* at these committal or bail proceedings. *See, e.g.*, 2 Hale, *supra*, at 120 (Justice of the peace is "to take the examination of the person accused, but this is to be without oath and put into writing"); Burn, *supra*, at 760 ("The examination of the person accused ought not to be upon oath."); Parker, *supra*, at 174 ("[T]he examination of the person accused, ought not to be upon oath.").[8]

Yet petitioner's theory would permit that very practice, allowing the government to place a defendant under oath at a probable cause hearing—or even a Marian committal or bail proceeding if those still existed—and force him to testify against himself, thereby subjecting him "to the cruel trilemma of self-accusation, perjury or contempt," *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964). After all, so long as the government promised not to use those statements *at trial*, the forced incriminatory testimony—made on pain of perjury on the one hand, or contempt on the other—would not, in petitioner's view, violate the Clause. This defies common sense and turns its back on the historical understandings of the Clause at the time of the Founding. *See* Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law:*

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[8] Significantly, a committal or bail hearing was the *only* time a defendant could be questioned by the government. After all, "England did not have a professional police force until the 19th century," *Crawford*, 541 U.S. at 53, and so police officers were not performing interrogations as they do today. Moreover, at trial, "criminal defendants were deemed incompetent as witnesses," *Ferguson v. Georgia*, 365 U.S. 570, 574 (1961), and therefore did not testify under oath. John H. Langbein, *The Origins of Adversary Criminal Trial* 280 (2003) (noting that "the privilege had so little capacity to affect the treatment of the criminal defendant at trial, since he was not allowed to be sworn until 1898 in England (a few decades earlier in many American jurisdictions)").

"Here I Go Down That Wrong Road Again," 74 N.C. L. Rev. 1559, 1626 (1996) (noting that at the Founding, even "[p]rospective jurors and witnesses in civil cases . . . could avail themselves of the privilege" and "[c]ourts did not compel them to answer on condition that their testimony not later be used against them").[9]

The United States acknowledges this history, but then argues that that the reason the "coerced confessions obtained in those pretrial interrogations" were problematic was because they were "then used to convict the defendant *at trial*." U.S. Br. 24. Of course, the United States is correct that forced statements made under oath could not be introduced against criminal defendants at trial. But there is no reason to think that the Founders were concerned *only* with the use of those statements at trial. After all, testimony obtained at these pretrial examinations was used not only at trial, but also in crafting the indictment. *See* Langbein, *Adversary Criminal Trial*, *supra*, at 44 n.169 (noting that "indictments . . . were usually drafted by an assistant to the clerk of the peace, sometimes working from Marian pretrial examinations when the offense in question had been serious enough to provoke a [justice of the peace's] investigation"); *id.* at 45 ("Most bills of indictment were generated in the Marian pretrial procedure."). As Hawkins's Treatise explained with regard to an informer's testimony, "the

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[9] This position also "ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). As Respondent explains, "[g]iven the ubiquity of plea bargaining, the probable cause hearing is for many defendants their only real chance to challenge the basis for the charges against [them]." Resp. Br. 57-58. It would be perverse to allow the government to introduce compelled, incriminating testimony at a probable cause hearing to induce a defendant to plead guilty, when that testimony could never be used against the defendant at trial.

Examination of an Informer taken upon oath . . . before Justices of Peace in pursuance of [the Marian committal and bail statutes] . . . may be given in evidence at the Trial of such inquisition, *or of an Indictment for the same felony*." 2 Hawkins, *supra*, at 429 (emphasis added). Petitioner and the United States offer no reason why the Founders would not have been equally concerned with the use at the indictment stage of preliminary examination statements made under oath.

In short, the Founders were concerned not just with the use of coerced statements at trial, but also with allowing the prosecution "to build up a criminal case" with "enforced disclosures by the accused," *Ullmann*, 350 U.S. at 427. To prevent this, they broadly prohibited a person from being "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. When the government introduces coerced, incriminating statements as evidence against a person at a probable cause hearing, the government violates that prohibition.

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Tenth Circuit should be affirmed.

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No. 16-1495

In the Supreme Court of the United States

CITY OF HAYS, KANSAS,
Petitioner,

v.

MATTHEW JACK DWIGHT VOGT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE STATE OF KANSAS AND 12 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 4

A. The Fifth Amendment does not bar use of compelled statements at 48-hour probable-cause hearings. 5

B. The Fifth Amendment does not bar use of compelled statements in grand jury proceedings. 8

C. The Fifth Amendment does not bar use of compelled statements at preliminary hearings. 11

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Adams v. Illinois,
405 U.S. 278 (1972) 12

Beck v. Washington,
369 U.S. 541 (1962) 11

City of Riverside v. McLaughlin,
500 U.S. 44 (1991) 6, 7

Coleman v. Alabama,
399 U.S. 1 (1970) 12

Costello v. United States,
350 U.S. 359 (1956) 10, 11

Garrity v. New Jersey,
385 U.S. 493 (1967) 4

Gerstein v. Pugh,
420 U.S. 103 (1975) ..... *passim*

Hickman v. State,
787 S.E.2d 700 (Ga. 2016) 7

Hurtado v. California,
110 U.S. 516 (1884) 11

Jackson v. Denno,
378 U.S. 368 (1964) ..... *passim*

Kastigar v. United States,
406 U.S. 441 (1972) 4

Ker v. California,
374 U.S. 23 (1963) 5

Lefkowitz v. Turley,
414 U.S. 70 (1973) 4

McCarthy v. Arndstein,
266 U.S. 34 (1924) 4

Peterson v. California,
604 F.3d 1166 (9th Cir. 2010) 12

Sims v. Georgia,
385 U.S. 538 (1967) 13

United States v. Calandra,
414 U.S. 338 (1974) 3, 9, 10

United States v. Williams,
504 U.S. 36 (1992) 9

CONSTITUTION

Ariz. Const. art. 3, § 30 11

Haw. Const. art.1, § 10 11

Ill. Const. art. I, § 7 11

N.M. Const. art. II, § 14 11

Okla. Const. art. II, § 317 11

U.S. Const. amend. IV 2, 5, 6

U.S. Const. amend. V ..... *passim*

STATUTES AND RULES

Ariz. R. Crim. P. 5.3 13

Conn. Gen. Stat. § 5-46a 13

Del. Super. Ct. Crim. R. 5.2 13

Fed. R. Crim. P. 5.1 ..... 3, 13

Haw. R. Penal. P. 5(c) 13

Ky. R. Crim. P. 3.14 13

S.D. Codified Laws § 23A-4-6 13

W. Va. R. Crim. P. 5.1 13

OTHER AUTHORITIES

4 W. LaFave et al., Criminal Procedure (4th ed. 2015) ..... *passim*

INTEREST OF *AMICI CURIAE*

This case involves whether the Fifth Amendment forbids the use of previously compelled statements at a pretrial probable-cause hearing. States hold several different types of hearings to assess whether there is probable cause to believe a defendant committed an offense. These proceedings include the 48-hour probable-cause hearing required by *Gerstein v. Pugh*, 420 U.S. 103 (1975), grand jury proceedings, and preliminary hearings.

Under longstanding practice, the determination whether a statement is compelled is rarely made prior to these hearings. Instead, those determinations are made by judges during a *Jackson v. Denno* voluntariness hearing or a suppression hearing that takes place after the probable-cause proceeding concludes. The states have a strong interest in maintaining their current processes, which have deep historical roots, prevent undue delays, and are consistent with the limited purpose of these preliminary proceedings.

SUMMARY OF THE ARGUMENT

The government does not violate the Fifth Amendment merely by compelling a statement. Instead, the question is what "use" of such a statement implicates the constitutional protection? Practical considerations, including not undermining the three different types of pretrial probable-cause hearings states commonly hold, support the result that admission of compelled statements in such preliminary, limited purpose proceedings does not violate the Fifth Amendment.

A. One common type of probable-cause hearing is the hearing this Court requires under the Fourth Amendment, typically within 48 hours of arrest. The purpose of the Fourth Amendment hearing is to ensure the arrest was lawful. Requiring police, prosecutors, and judges to make a non-adversarial determination of whether a statement was compelled prior to its use in that hearing would be exceedingly difficult. It would also largely be an exercise in futility because any decision by a magistrate would be preliminary, and not binding on either a grand jury or a judge at a later preliminary hearing or suppression hearing. That result would exact a high cost on the criminal justice system for, at best, minimal benefits.

B. Another common probable-cause process many states use, but which is not constitutionally mandated, is the grand jury proceeding. These proceedings also are not adversarial, and guilt or innocence is not adjudicated. In fact, the defendant is rarely present unless called as a witness, and no judge is present. The proceedings typically lack the evidentiary and procedural restrictions applied in criminal trials and, in the vast majority of jurisdictions, the sole evidentiary rule is that witnesses may assert their own testimonial privileges. Requiring a determination of whether a statement is compelled prior to or during the grand jury proceedings is therefore contradictory to the entire grand jury process. It would afford a possible defendant a far greater role than historically and currently provided.

Further, "[s]uppression hearings would halt the orderly progress of an investigation, and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective." *United States v. Calandra*, 414 U.S. 338, 349 (1974). In fact, this Court has already held that grand jury indictments cannot be attacked on the ground that they were based on inadmissible evidence or compelled statements. *Id.* at 344-45. The Fifth Amendment does not demand a pre-hearing determination of whether a statement is compelled in the grand jury context.

C. An even more frequently used, but also not constitutionally mandated, probable-cause hearing is the preliminary hearing. These hearings benefit defendants by allowing them to preview the evidence against them and preventing unwise prosecutions from proceeding. Other than requiring counsel at these adversarial proceedings, this Court has not held that the Constitution mandates any additional procedures. Most states—consistent with Federal Rule of Criminal Procedure 5.1—preclude challenges to whether evidence was lawfully obtained during the preliminary hearing. Instead, after a defendant is bound over for trial following the preliminary hearing, states use *Jackson v. Denno* or suppression hearings to determine whether a statement was compelled and thus to ensure compelled statements are not used at *trial*.

Requiring a ruling on Fifth Amendment claims prior to or during preliminary hearings would suffer from many of the same problems noted with respect to the 48-hour probable-cause hearings. In addition, a holding that the use of compelled statement violates the Fifth Amendment at preliminary hearings, but not

at grand jury proceedings, would coerce prosecutors to use grand juries instead of preliminary hearings. That result would contradict this Court's traditional deference to the states with respect to pretrial procedures. In the end, post-probable cause *Jackson v. Denno* and suppression hearings afford defendants all the protection required under the Fifth Amendment.

ARGUMENT

Determining when the Fifth Amendment right against self-incrimination is implicated requires two distinct inquiries. The first is when, outside a criminal proceeding, a statement can be deemed compelled for Fifth Amendment purposes. This Court has held that statements individuals make on pain of penalty in civil hearings, legislative proceedings, and in connection with government employment can be deemed compelled. See *Garrity v. New Jersey*, 385 U.S. 493, 497 (1967) (public employment); *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (citing *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924)).

But just because a person is compelled to make a statement against self-interest does not mean his or her privilege has been violated. The Court has recognized time and again that the government may compel incriminating statements so long as the speaker obtains (expressly or implicitly) some measure of immunity respecting those statements' later use against the speaker. See *Garrity*, 385 U.S. at 497 (effectively granting implicit immunity when public employment is threatened); *Kastigar v. United States*, 406 U.S. 441, 442 (1972) (testimony may be compelled if immunity is expressly granted). That leads to the second question, which is the one presented here: When

does the *use* of a compelled statement violate the Self-Incrimination Clause? Clearly its use at trial violates the privilege. But the privilege is not violated by the compelled statement's use at a pretrial probable-cause proceeding.

As the Petitioner explains, this Court has frequently described the privilege against self-incrimination as a trial right. The privilege may not be invoked if there is no threat of criminal liability, which can only be imposed following a criminal trial. Still other constitutional provisions that refer to "witnesses" protect a *trial* right. See Pet. Br. 9-15, 21-22. A closer examination of the most common state pretrial proceedings—the constitutionally required 48-hour probable-cause hearing, grand jury proceedings, and preliminary hearings—confirms that the privilege does not apply to statements used in those proceedings. Prohibiting the use of compelled statements in those settings would fundamentally reshape those proceedings and would be inconsistent with their limited purposes.

A. The Fifth Amendment does not bar use of compelled statements at 48-hour probable-cause hearings.

This Court has long recognized that police officers with probable cause to believe a suspect has committed a crime may arrest the suspect before securing an arrest warrant. See *Ker v. California*, 374 U.S. 23 (1963). "To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy," however, the suspect is entitled to a prompt "judicial determination of probable cause as a prerequisite to extended restraint of liberty following

arrest." *Gerstein v. Pugh*, 420 U.S. 103, 112, 114 (1975). In *City of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991), the Court held that this judicial probable-cause hearing must generally take place "within 48 hours of arrest."

The nature of these hearings is incompatible with a rule barring use of compelled statements. The 48-hour hearing substitutes for the pre-arrest judicial determination of probable cause, which "traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony." *Gerstein*, 420 U.S. at 120. For that reason, "adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment." *Id.* Defendants are not entitled to counsel at these hearings, to confront their accusers, to testify on their own behalves, and so on.

And time is of the essence. Given the "serious consequences of prolonged detention," the probable-cause "determination must be made . . . promptly after arrest"—usually within 48 hours. *Id.* at 114, 125; *McLaughlin*, 500 U.S. at 55.

Police and prosecutors could not possibly make informed decisions regarding the circumstances surrounding and thus the permissible use of suspects' statements at these hearings. In some cases, prosecutors would have to watch multiple recordings of police interviews of a defendant for each of their criminal cases within less than 48 hours of an arrest to determine whether statements were compelled. Or, if no recordings exist, prosecutors would have to investigate the circumstances of the police interviews of defendants. Such onerous, labor intensive

investigations are not feasible in densely populated jurisdictions, and exceedingly difficult in virtually every jurisdiction. And because probable-cause hearings are nonadversarial, prosecutors would have to conduct all of this analysis and assessment in a vacuum, without even knowing whether an arrestee would claim the privilege as to any particular statements.

More generally, determining whether a statement was voluntarily made is a complex inquiry that cannot practically be undertaken so soon after arrest. "Expanded concepts of fairness in obtaining confessions have been accompanied by a correspondingly greater complexity in determining whether an accused's will has been overborne—facts are frequently disputed, questions of credibility are often crucial, and inferences to be drawn from established facts are often determinative." *Jackson v. Denno*, 378 U.S. 368, 390 (1964). Indeed, the determination whether a confession is voluntary may even involve expert testimony by the defense. E.g., *Hickman v. State*, 787 S.E.2d 700, 704 (Ga. 2016).

There is simply no way prosecutors and courts can assess and resolve voluntariness at hearings held within 48 hours of arrest. *Gerstein* thus sensibly "established a 'practical compromise' between the rights of individuals and the realities of law enforcement." *McLaughlin*, 500 U.S. at 53 (quoting *Gerstein*, 420 U.S. at 114). Barring the use of compelled statements at *Gerstein* hearings would undermine that compromise and make it difficult, if not impossible, to hold such hearings promptly after arrest.

Even if courts were required to make such determinations early in the proceedings, any resolution would necessarily be preliminary, and conclusive only for the *Gerstein* hearing. A magistrate's conclusion that a statement was compelled would not bind a grand jury or judge at a preliminary hearing or later suppression hearing. 4 W. LAFAVE ET AL., CRIMINAL PROCEDURE § 14.4(b), p. 390 (4th ed. 2015) (preliminary evidentiary hearing rulings not binding on trial judge). Conversely, a magistrate's decision to allow the use of a defendant's statements to the police would have little to no effect. Once the defendant obtains counsel, such counsel would almost certainly make new arguments that the defendant's statements were not voluntary. A decision holding that the Fifth Amendment bars the use of compelled statements at *Gerstein* hearings would therefore serve little to no practical purpose—but such a rule would with certainty exact a high cost on the criminal justice system.

B. The Fifth Amendment does not bar use of compelled statements in grand jury proceedings.

Although the Constitution does not require states to use grand juries, 18 states require prosecution by grand jury indictment (unless waived) for all felonies, upon a finding of probable cause or prima facie guilt. *Id.* at § 14.2(c), p. 337, § 15.2(f), p. 530.[1] An additional

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[1] These states are Alabama, Alaska, Delaware, Georgia, Kentucky, Maine, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, South Carolina, Tennessee, Texas, Virginia, and West Virginia. *Id.* at § 15.1(d), p. 468-69, nn.190-97.

four states require indictments in some, but not all, felonies. *Id.* at § 15.1(e), p. 478.[2] The remaining 28 states also permit indictment by grand jury; but the overwhelming majority of those states also permit charging by information followed by a preliminary hearing in place of the grand jury. *Id.* at § 14.2(d), p. 341, § 15.1(g), p. 491-92. In most of those states, use of a grand jury is not standard practice. *Id.* at § 15.1(g), p. 493.

Barring use of compelled statements is incompatible with the nature of grand jury proceedings. As this Court has explained, "[a] grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. Rather, it is an ex parte investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person." *United States v. Calandra*, 414 U.S. 338, 343-44 (1974). Grand jury proceedings are therefore typically "unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial." *Id.* at 349. A judge is never present and the defendant is only present during his own testimony, in those rare cases where he testifies. See *United States v. Williams*, 504 U.S. 36, 48 (1992) ("in its day-today functioning, the grand jury generally operates without the interference of a presiding judge"); 4 W. LAFAVE ET AL., *supra*, § 15.2(b), p. 500, § 15.2(c), p. 512. In the vast majority of jurisdictions, the only evidentiary rule applicable in grand jury

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[2] These states are Louisiana, Rhode Island, Florida, and Minnesota. *Id.* at § 15.1(e), p. 468-69, nn.629, 671.

proceedings is that witnesses may assert their own testimonial privileges. *Id.* at § 15.2(d), p. 516.[3]

Requiring grand juries, or the courts that supervise them, to determine whether statements being presented to the grand jury were compelled is antithetical to that process. Requiring such an inquiry would necessarily accord possible defendants a far greater role in grand jury proceedings than they historically have been provided and a far greater role than virtually all jurisdictions presently provide. Further, "[s]uppression hearings would halt the orderly progress of an investigation, and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective." *Calandra*, 414 U.S. at 349.

For these reasons, this Court has held that grand jury indictments are not subject to challenge because they are allegedly based on inadmissible evidence or hearsay, *Costello v. United States*, 350 U.S. 359, 363 (1956), or because they are based on allegedly compelled statements, *Calandra*, 414 U.S. at 344-45. As the Court explained, "[i]f indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the

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[3] States therefore cannot (absent a grant of immunity) compel witnesses to incriminate themselves before grand juries. As noted at the outset, however, the question of when statements are deemed compelled for Fifth Amendment purposes is distinct from the question of when *use* of a compelled statement violates the Amendment.

merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury." *Costello*, 350 U.S. at 363. Permitting those challenges "would run counter to the history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change." *Id.* Nor does the Fifth Amendment.

C. The Fifth Amendment does not bar use of compelled statements at preliminary hearings.

The Constitution does not mandate that states use grand juries, see *Hurtado v. California*, 110 U.S. 516 (1884); it also does not compel the states to interpose any preliminary proceeding between a prosecutor's charge by information and the criminal trial itself. See *Gerstein*, 420 U.S. at 119, 123; *Beck v. Washington*, 369 U.S. 541, 545 (1962). The vast majority of the 28 states that permit felony prosecutions to be initiated by prosecutors filing an information nonetheless provide for preliminary hearings in which the state "must establish that there is sufficient evidence supporting its charge to 'bind the case over' to the next stage of the process." 4 W. LAFAVE ET AL., *supra*, § 14.1(a), p. 308, § 15.1(g), p. 491.[4] In addition, all of the states that use

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[4] At least five of those states have constitutional provisions requiring preliminary hearings when a case is charged by information. Ariz. Const. art. 3, § 30; Haw. Const. art. 1, § 10; Ill. Const. art. I, § 7; N.M. Const. art. II, § 14; Okla. Const. art. II, § 317.

grand juries require or permit preliminary hearings. *Id.* at 14.2(c), p. 337.

These hearings benefit defendants, allowing them to preview the state's case. The purpose of preliminary hearings is to

> prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of public trial, to save the defendant from the humiliation and anxiety involved in public prosecution, and to . . . [ensure that] there are substantial grounds upon which a prosecution may be based.

Id. at § 14.1(a), p. 309 (internal quotation marks and citations omitted). For those reasons, "the preliminary hearing is held at an early stage of the prosecution." *Adams v. Illinois*, 405 U.S. 278, 282 (1972). In fact, many states require by statute that the hearing be held within a few days or weeks following the defendant's first appearance before a judge. 4 W. LAFAVE ET AL., *supra*, § 14.2(f), p. 350.

The Constitution places few constraints on how states conduct these preliminary hearings. The Court has held that the defendant has the right to the assistance of counsel at the preliminary hearing, *Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (plurality opinion), but has not mandated additional procedures, see *Peterson v. California*, 604 F.3d 1166 (9th Cir. 2010) (holding that the Confrontation Clause does not apply to preliminary hearings).

Accordingly, although states have chosen to make their preliminary hearings adversarial and overseen by a judge, "they vary considerably in their treatment of the applicability of the rules of evidence," with only a few "requir[ing] full application of the rules." 4 W. LAFAVE ET AL., *supra*, § 14.4(b), p. 382. All jurisdictions require magistrates, like grand juries, "to recognize testimonial privileges," *id.*, meaning that witnesses (including the defendant) cannot be compelled to testify at preliminary hearings. But most states—consistent with Federal Rule of Criminal Procedure 5.1—preclude challenges to whether evidence was lawfully obtained at the preliminary hearing. *Id.*[5] Instead, states typically leave suppression motions to the presiding trial judge if and when the defendant is bound over for trial.

Most relevant here, trial courts in those states hold *Jackson v. Denno* or suppression hearings to determine whether a statement is voluntary before it is submitted to the jury. See *Jackson v. Denno*, 378 U.S. 368, 395 (1964); *Sims v. Georgia*, 385 U.S. 538, 543-44 (1967). These widely used procedures ensure that coerced statements are not used at the defendant's criminal *trial*. Respondent's reading of the Fifth Amendment—which would, as a practical matter, require that states determine the admissibility of a defendant's statements prior to or during the preliminary hearing—would force states to dramatically restructure their existing procedures, all for little or no gain and at significant cost to the states and their criminal justice systems.

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[5] See, *e.g.*, Ariz. R. Crim. P. 5.3; Conn. Gen. Stat. § 5-46a; Del. Super. Ct. Crim. R. 5.2; Haw. R. Penal. P. 5(c); Ky. R. Crim. P. 3.14; S.D. Codified Laws § 23A-4-6; W. Va. R. Crim. P. 5.1.

As Professor LaFave explains, allowing the defense to seek suppression at the preliminary hearing is "unnecessary to achieving effective screening." 4 W. LAFAVE ET AL., *supra*, § 14.4(b), p. 392. Because any decision would not be final, both a magistrate and the trial judge would necessarily be required to hold hearings on the issue, leading to wasteful judicial duplication. *Id.* Further, "in jurisdictions where the hearing is held with exceptional promptness," requiring suppression hearings would either cause delays or would give the parties insufficient time "to investigate and prepare." *Id.*

Finally, if this Court were to conclude that use of a compelled statement before a grand jury does not violate the Fifth Amendment, but its use at a preliminary hearing does, the inevitable consequence would be to coerce prosecutors to use grand juries instead of preliminary hearings. That result would contravene this Court's admonition that the Constitution does not impose a "single preferred pretrial procedure" and that "flexibility and experimentation by the States" in this regard is "desirable." *Gerstein*, 420 U.S. at 123. Instead, *Jackson v. Denno* or suppression hearings conducted by judges after defendants are bound over for trial provide defendants all the procedural protections necessary to secure their Fifth Amendment rights.

CONCLUSION

For the foregoing reasons, the judgment of the Tenth Circuit should be reversed.

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No. 16-1495

IN THE

Supreme Court of the United States

CITY OF HAYS, KANSAS,
Petitioner,

v.

MATTHEW JACK DWIGHT VOGT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF AMICI CURIAE 1

STATEMENT 3

SUMMARY OF ARGUMENT 9

THE FIFTH AMENDMENT'S GUARANTEE AGAINST SELF-INCRIMINATION APPLIES AT PRELIMINARY HEARINGS. 11

A. This principle is consistent with the Constitution's text and with precedent. 11

B. Limiting the Self-Incrimination Clause's application to the criminal trial itself would severely prejudice defendants. 18

C. The government's policy concerns do not withstand scrutiny. 24

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases

Best v. City of Portland,
554 F.3d 698 (7th Cir. 2009) 14, 24

Blyew v. United States,
13 Wall. 581 (1872) 13

Chavez v. Martinez,
538 U.S. 760 (2003) 13, 27

Coleman v. Alabama,
399 U.S. 1 (1970) ..... 7, 8, 15, 22 ,23

Counselman v. Hitchcock,
142 U.S. 547 (1892) 14, 15

Higazy v. Templeton,
505 F.3d 161 (2d Cir. 2007) 14, 24

In re Keijam T.,
602 A.2d 967 (Conn. 1992) 19

Johnson v. New Jersey,
384 U.S. 719 (1966) 12

Kastigar v. United States,
406 U.S. 441 (1972) 14, 26

Lafler v. Cooper,
566 U.S. 156 (2012) 4

Malloy v. Hogan,
378 U.S. 1 (1964) 11, 12, 28

Melendez-Diaz v. Massachusetts,
557 U.S. 305 (2009) 25

Michigan v. Tucker,
417 U.S. 433 (1974) 12, 21

Miranda v. Arizona,
384 U.S. 436 (1966) 2, 12

Missouri v. Frye,
566 U.S. 134 (2012) 4, 15

Mitchell v. United States,
526 U.S. 314 (1999) 27, 28

Padilla v. Kentucky,
559 U.S. 356 (2010) 4

People v. Dist. Court, 17th Judicial Dist.,
926 P.2d 567 (Colo. 1996) 19

People v. McBride,
516 N.W.2d 148 (Mich. Ct. App. 1994) 19

People v. Melotik,
561 N.W.2d 453 (Mich. Ct. App. 1997) 18

Rayyis v. Super. Ct.,
35 Cal. Rptr. 3d 12 (Cal. Ct. App. 2005) 18

Rothgery v. Gillespie Cty.,
554 U.S. 191 (2008) 14

Sheriff v. Witzenberg,
145 P.3d 1002 (Nev. 2006) 18, 19

Sornerberger v. City of Knoxville,
434 F.3d 1006 (7th Cir. 2006) 13

State v. Bockert,
893 P.2d 832 (Kan. 1995) 19

State v. Carlson,
845 N.W.2d 827 (Minn. Ct. App. 2014) 18

State v. Clark,
825 A.2d 803 (Vt. 2003) 18

State v. Haukos,
847 N.W.2d 270 (Minn. Ct. App. 2014) 19

State v. Lownes,
499 N.W.2d 896 (S.D. 1993) 19

State v. McLellan,
294 P.3d 203 (Idaho 2013); 19

State v. Moats,
457 N.W.2d 299 (Wis. 1990) 18

Stoot v. City of Everett,
582 F.3d 910 (9th Cir. 2009) 13, 24

United States v. Bennett,
514 A.2d 414 (D.C. 1986) 22

United States v. Frumento,
552 F.2d 534 (3d Cir. 1977) 26

United States v. Hubbell,
530 U.S. 27, 35 (2000) 16

United States v. White,
322 U.S. 694 (1944) 25

Constitutional Provisions

U.S. Const. amend. V 9, 11, 12, 16

Statutes and Court Rules

D.C. Crim. P. R. 5.1 8

Fed. R. Crim. P. 5.1 4

Kan. Stat. § 22-2902 (2016) 3

Minn. R. Crim. P. 3.02 18

Wis. Stat. § 970.03 (2015-16) 20

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year, in this Court and others, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. In particular, in furtherance of NACDL's mission to safeguard funda-

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[1] Both parties consented to the filing of this amici curiae brief in support of Respondent. No counsel to a party in this case authored this brief in whole or in part. No party or party's counsel made any monetary contribution that was intended to or did fund the preparation or submission of this brief. No person or entity other than the amici and their counsel, made any monetary contribution that was intended to or did fund the preparation or submission of this brief.

mental constitutional rights, NACDL frequently appears as amicus curiae in cases involving the Fifth Amendment and its state analogues, speaking to the importance of ensuring that no person is compelled in any criminal case to be a witness against himself. NACDL brings a vital perspective to the scope of the Fifth Amendment and has an interest in protecting a criminal defendant against the government's use of compelled, self-incriminating statements in pretrial criminal proceedings.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization of approximately 1.6 million members dedicated to the principles of liberty and equality embedded in the United States Constitution. Founded nearly a century ago, the ACLU has appeared in myriad cases before this Court, both as merits counsel and as an amicus curiae, to defend the Bill of Rights. Many of the ACLU's efforts have focused on enforcing those portions of the Bill of Rights having to do with administration of the criminal justice system. The ACLU participated as amicus curiae in *Miranda v. Arizona*, 384 U.S. 436 (1966), because effectuation of a person's right to be free from compelled self-incrimination is essential to the preservation of our accusatorial system of criminal justice. More than fifty years later, protection of the constitutional right against self-incrimination remains critical to the fair administration of criminal justice.

STATEMENT

1. Most States do not rely on grand juries to launch every felony criminal prosecution. *See* Wayne R. LaFave et al., *Criminal Procedure* § 15.1(g) (4th ed. 2017). In states that do not use grand juries exclusively, a criminal case may be initiated through the prosecutor's filing of a criminal complaint. The details of criminal procedure vary, but all non-grand jury States utilize some form of preliminary hearing in felony cases after the criminal complaint has been filed. This hearing can be known by various names, including preliminary examination, probable cause hearing, commitment hearing, examining trial, and bindover hearing. But by any name, the hearing serves a common purpose: after a criminal complaint has been filed, the prosecutor must demonstrate, to a judicial officer's satisfaction, that sufficient evidence supports the charge(s) for the case to proceed to trial. *See id.*, § 14.1(a). At preliminary hearings, a judicial officer presides and all parties have the right to be represented by counsel. *Id.* In States that utilize a preliminary hearing, absent the defendant making an informed waiver of the hearing, *see, e.g.*, Kan. Stat. Ann. § 22-2902(4) (2016), there can be no criminal conviction without the judicial officer finding probable cause for the prosecution to proceed to trial. *See* LaFave et al., *supra* § 14.3(c). Respondent had a preliminary hearing pursuant to Kansas law. *See* Pet'r Br. 3-4; Resp't Br. 6.

In the federal system, when prosecutors commence a federal criminal charge by complaint

prior to indictment by grand jury, a preliminary examination is necessary to determine whether probable cause exists and whether the defendant will be required to appear at future court appearances. Fed. R. Crim. P. 5.1(e). At a preliminary examination, a federal magistrate judge presides and all parties have the right to be represented by counsel. *Id.* The purpose of the preliminary examination—like the state-court preliminary hearing—is for a judicial officer to determine whether there is probable cause to sustain the criminal proceedings. When federal prosecutors choose to proceed in a way that necessitates a preliminary examination—by criminal complaint prior to indictment—the charge cannot proceed without the magistrate judge finding probable cause. Fed. R. Crim. P. 5.1(e)-(f).

2. In contemporary American criminal practice, a preliminary hearing or preliminary examination may provide a criminal defendant's only "day in court." As this Court has recognized, ours "is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). The numbers amplify this observation. Five years ago, this Court observed the "simple reality" that "ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Missouri v. Frye*, 566 U.S. 134, 143 (2012); *see also Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) ("Pleas account for nearly 95% of all criminal convictions.").

These numbers do not appear to have changed. The most recent compiled statistics for federal

convictions show a slight uptick in the incidence of guilty pleas, to 97.64% (from 97.26%). *See* Dep't of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Online, Table 5.22.2010*, http://www.albany.edu/sourcebook/pdf/t5222010.pdf (last visited Dec. 19, 2017,.[2]

For those States—twenty-odd, plus the District of Columbia—that report their criminal justice statistics to the National Center for State Courts, recent years show a continued trend dominated by guilty pleas. In 2014, those States had jury or bench trials in less than 2.5% of felony dispositions (33,781 trials from a total of 1,352,192 cases); in 2015, the incidence of jury or bench trials increased slightly but remained under 2.8% (36,141 trials from a total of 1,302,696 cases).[3] This stark fact underscores the

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[2] Federal funding for the Sourcebook of Criminal Justice Statistics was withdrawn, and the 2010 edition is the latest compilation of that volume. *See* James R. Jacobs, *Sourcebook of Criminal Justice Statistics: another defunded publication*, Free Gov't Info. (June 29, 2012) https://freegovinfo.info/node/3731 (last visited Dec. 19, 2017).

[3] These numbers derive from reports by the Court Statistics Project, hosted on the National Center for State Courts website, http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_ Criminal (last visited Dec. 19, 2017), by choosing the tables "Felony Jury Trials and Rates" and "Felony Bench Trials and Rates" for each of the years 2014, 2015, and 2016, and then aggregating the number of cases resolved through each trial format in each state for a given year. For both 2014 and 2015, Iowa was excluded from the calculations above because it reported statistics for bench trials but not for jury trials. (continued)

importance of pretrial proceedings, of which the preliminary hearing is typically the most extensive and is the only hearing directed to the elements of the alleged crime.

3. Preliminary hearings are intended to screen out baseless prosecutions by ensuring that "there are substantial grounds upon which prosecution may be based." LaFave et al., *supra*, § 14.1(a). At the conclusion of a preliminary hearing, the presiding judicial officer provides an independent analysis of the charging decision. If the prosecution fails to show—to the presiding judicial officer's satisfaction—probable cause for a felony charge to proceed to trial, that charge will not move forward in that particular case. The prosecution may direct law enforcement to continue investigating and collecting evidence, but, at least for the moment, the charge is dismissed. *Id.* § 14.3.

Preliminary hearings serve several additional purposes. These include:

For 2016, North Carolina reported numbers (after not doing so the previous two years) that paint the state as an outlier. North Carolina reported nearly 75,000 trials out of a total of 112,595 felony dispositions for the year. That rate of 66.3% suggests that North Carolina tries criminal cases at more than eight times the incidence of Nebraska, which had the next highest trial rate for 2016. Setting North Carolina's data to one side, the numbers remain on trend, with total trial incidence decreasing to 2.3% (28,901 trials from a total of 1,225,931 cases), based on numbers reported from twenty-three states and D.C.

- Laying the groundwork for future impeachment. Preliminary hearings provide an opportunity for the defense to elicit damaging admissions or testimony inconsistent with a witness's initial statements to the police. LaFave et al., *supra*, § 14.1; *see also Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (at preliminary hearing "skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial").
- Preserving evidence. Preliminary hearings provide an opportunity to preserve witness testimony, which may be used if the witness should die, disappear, or otherwise become unavailable to testify. LaFave et al., *supra*, § 14.1; *see also Coleman*, 399 U.S. at 9 (at preliminary hearing "interrogation of witnesses by an experienced lawyer can ... preserve testimony favorable to the accused of a witness who does not appear at the trial").
- Illuminating prior bail determinations or conditions of pretrial release. The evidence adduced at a preliminary hearing may cause the court to reassess bail or other terms imposed as a condition of pretrial release. LaFave et al., *supra*, § 14.1; *see also Coleman*, 399 U.S. at 9 (at preliminary hearing "counsel can also be influential ... in making effective arguments for the accused on such matters as

the necessity for an early psychiatric examination or bail").

- Providing notice. Preliminary hearings provide an opportunity for the defense to obtain notice of the scope and depth of the prosecution's evidence by cross-examining witnesses presented by the prosecutor and by subpoenaing other potential trial witnesses to testify at the hearing. LaFave et al., *supra* § 14.1(a)-(d); *see also Coleman*, 399 U.S. at 9 (1970) ("trained counsel" at preliminary hearing can "discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial").[4]
- Facilitating plea bargains. The preliminary hearing may help the defendant—and sometimes the prosecutor—appreciate the relative strength of the evidence and thereby guide the parties toward a plea bargain. LaFave et al., *supra*, § 14.1(a)-(d).
- Providing a forum for threshold constitutional challenges to evidence. In some—but not all—jurisdictions, the preliminary hearing offers

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[4] Some States' criminal procedures assert that preliminary hearings are not for discovery. *See, e.g.*, D.C. Crim. P. R. 5.1.(d). This underscores that defendants are entitled to discovery at a later juncture, but it does not alter the practical reality—as recognized by this Court in *Coleman*—that preliminary hearings provide an opportunity for the defense to glean insight into the prosecution's case.

> the initial opportunity for the defense to challenge the constitutional validity of evidence. The preliminary hearing sometimes offers sufficient advantages over a pretrial motion to suppress that defense counsel will insist upon a preliminary examination for this purpose alone. *Id.*

SUMMARY OF ARGUMENT

This Self-Incrimination Clause of the Fifth Amendment applies to preliminary hearings (and analogous proceedings, whatever name they may be assigned under various State law provisions) when such proceedings are held after the initiation of criminal charges. This conclusion follows from the constitutional text, this Court's precedents, and consideration of how such proceedings function in the context of criminal prosecutions.

A. The words of the Self-Incrimination Clause, as construed by this Court, lead to this conclusion. The Fifth Amendment guarantees that "no person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This Court has consistently recognized and affirmed the vital function this guarantee plays in maintaining the fair administration of justice.

1. The preliminary hearing is part of a "criminal case" and therefore under the umbrella of the Self-Incrimination Clause. The preliminary hearing occurs after the filing of a criminal complaint. It

takes place in open court, with all parties having the opportunity to be represented by counsel. And a judicial officer presides. It is manifestly distinct from the criminal investigatory process. Though this Court has not pinpointed exactly when a "criminal case" begins, it must be at or before the preliminary hearing.

2. Prosecutorial use of a defendant's involuntary, self-incriminating statement at the preliminary hearing violates the Self-Incrimination Clause because it compels the defendant to be a "witness against himself." Not every criminal case has a preliminary hearing, but cases that do cannot proceed to trial or conviction unless the presiding judicial officer finds probable cause. It follows that prosecutorial use of a defendant's involuntary, self-incriminating statement to substantiate probable cause is part and parcel of the criminal prosecution. If the rule were otherwise, nothing would stop the prosecutors from calling defendants to the stand in every preliminary hearing to ask them whether they committed the crime. Under the government's theory, so long as the answer was not used at trial, a defendant could be compelled to testify against himself at a preliminary hearing.

B. Limiting the Self-Incrimination Clause to a trial right would deny criminal defendants a critical constitutional protection where it is often most important. A criminal defendant's compelled statement alone will often satisfy the probable cause standard at a preliminary hearing, even though that statement could not be used against the defendant at

trial. Such use undermines the purposes of preliminary hearings. It also pressures defendants to plead guilty before trying to vindicate their constitutional rights. Nearly all cases in our criminal justice system end in pleas. It is unjust to require defendants to swim against that systemic current solely for an initial opportunity to test their constitutional rights.

C. The United States's policy arguments in support of Petitioner do not withstand scrutiny. Courts are equipped to adjudicate challenges to the use of compelled, self-incriminatory statements at the preliminary hearing stage. Arguments about judicial efficiency and streamlined procedures do not take precedence over constitutional commands. None of the government's arguments compels a different outcome here.

ARGUMENT

THE FIFTH AMENDMENT'S GUARANTEE AGAINST SELF-INCRIMINATION APPLIES AT PRELIMINARY HEARINGS.

A. This principle is consistent with the Constitution's text and with precedent.

The Fifth Amendment guarantees that "no person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Self-Incrimination Clause is a critical bulwark designed to deter coercion and ensure the impartial administration of criminal justice. *Malloy v. Hogan*, 378 U.S. 1, 2-3 (1964). "This Court's decisions have

referred to the right as 'the mainstay of our adversary system of criminal justice.'" *Michigan v. Tucker*, 417 U.S. 433, 439 (1974) (quoting *Johnson v. New Jersey*, 384 U.S. 719, 729 (1966)). Through this provision, governments, both state and federal, are required to establish guilt by evidence independently and freely secured, and may not use compulsion to prove a charge against an accused with his own words. *Malloy*, 378 U.S. at 6. The privilege against self-incrimination is an absolute right: even a compelling governmental interest cannot justify its infringement. And its protection is so critical that this Court established a prophylactic rule—in *Miranda v. Arizona*, 384 U.S. 436 (1966)—requiring law enforcement to inform individuals in any custodial interrogation of the right to remain silent.

1. The guarantee applies "in any criminal case." U.S. Const. amend. V. Petitioner is incorrect to equate the Fifth Amendment's reference to a "criminal case" with the narrower concept of a "criminal trial." Had the Framers meant to restrict this protection only to trial proceedings, they could have done so. Instead, the Self-Incrimination Clause provides broader protection against the use of compelled statements in "any criminal case." The court below extensively examined the term "criminal case" and properly concluded that it encompasses preliminary hearings like the one at issue in this case. Pet'r App. 10a-19a.

Precedent confirms that a preliminary hearing is part of a "criminal case" and therefore under the umbrella of the Self-Incrimination Clause. This

Court has previously held that "criminal case" is a general term for "an action, cause, suit, or controversy at law" or "a question contested before a court of justice." *Chavez v. Martinez*, 538 U.S. 760, 766 (2003) (plurality) (citing *Blyew v. United States*, 13 Wall. 581, 595 (1872)). Although the *Chavez* Court did not pinpoint "the precise moment when a 'criminal case' commences" for Fifth Amendment purposes, it clearly did not limit the guarantee against use of compelled statements to trial, stating that "'[a] criminal case' at the very least requires the initiation of criminal proceedings." *Id.* at 766.

It follows that an adversarial, evidentiary proceeding held *after* a criminal complaint has been filed by a prosecutor, designed for a judicial officer to determine whether there is sufficient evidence proceed to trial, is part of the criminal case at which compelled self-incriminating statements may not be used. *See* Resp't Br. 15-16. Indeed, courts applying *Chavez* have consistently held that the Self-Incrimination Clause is violated where compelled statements are used by prosecutors before trial to aid in the establishment of facts showing the defendant committed a crime. *See e.g., Sornerberger v. City of Knoxville*, 434 F.3d 1006, 1024-27 (7th Cir. 2006) (use of a suspect's unwarned statements at an arraignment hearing, probable cause hearing, and bail hearing constituted use of the statements in a "criminal case"); *Stoot v. City of Everett*, 582 F.3d 910, 924 (9th Cir. 2009) (use of coerced confession in a probable cause affidavit filed in support of indictment and at pretrial arraignment and bail

hearing constituted use in a "criminal case" in violation of Fifth Amendment); *see also, e.g.*, *Higazy v. Templeton*, 505 F.3d 161, 179 (2d Cir. 2007) (use of compelled statements at bail hearing sufficient to state claim for Fifth Amendment violation); *Best v. City of Portland*, 554 F.3d 698, 702 (7th Cir. 2009) (use of compelled statements at pre-trial suppression hearing sufficient to state claim for Fifth Amendment violation). As these cases illustrate—and as detailed on pages 15-18 of Respondent's brief—the term "criminal case" within the meaning of the Fifth Amendment must include the preliminary hearing.

The conclusion that the Self-Incrimination Clause's protection against use of compelled statements applies to preliminary hearings finds additional support in this Court's Sixth Amendment jurisprudence. Established law provides that the term "criminal case" in the Fifth Amendment has at least as broad a scope as the term "criminal prosecution" does in the Sixth Amendment. *Counselman v. Hitchcock*, 142 U.S. 547, 562-63 (1892), *overruled on other grounds by Kastigar v. United States*, 406 U.S. 441 (1972). And in interpreting the Sixth Amendment, this Court has held that a "criminal prosecution" commences upon "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, *preliminary hearing*, indictment, information, or arraignment." *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 198 (2008) (emphasis added). If, as *Rothgery* holds, a "criminal prosecution" includes a prelim-

inary hearing, such a hearing must also fall within the term "criminal case" used in the Fifth Amendment. *See Counselman*, 142 U.S. at 562-63.

Similarly, in *Missouri v. Frye*, the Court recognized that plea bargaining is an essential component of the criminal justice system that can determine "who goes to jail and for how long." 566 U.S. at 144 (citing Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912 (1992)). As such, the court deemed plea bargaining a critical stage of the criminal prosecution, during which the defendant is afforded a constitutional right to effective assistance of counsel. By the same logic, a preliminary hearing is a critical stage of a criminal case. *See Coleman*, 399 U.S. at 7-10. Such a hearing—which often functions as the defendant's only day in court—plays a critical part in determining whether the defendant "goes to jail and for how long." *Frye*, 556 U.S. at 144. As such, there can be no doubt that preliminary hearings are within the ambit of the Self-Incrimination Clause.

2. While the chronology and substance of preliminary hearings establish that they fall squarely within "a criminal case," those are not the only reasons the Self-Incrimination Clause applies. Using a defendant's compelled testimony to establish probable cause forces him to be "a witness against himself" in a hearing that is a necessary stepping stone toward criminal conviction. Just as it would violate the Fifth Amendment for the prosecutor to call the defendant to the stand in a preliminary hearing and compel him to answer whether he

committed the crime, so it violates the Fifth Amendment to use statements he was compelled to give elsewhere against him in that hearing.

When a preliminary hearing or preliminary examination is held, the judicial officer's finding of probable cause is a necessary precondition for the prosecution to proceed to criminal conviction. That means that the preliminary hearing—assuming the prosecution prevails at that hearing—moves the defendant one step closer to conviction; and if the prosecution does not prevail, the criminal case is over. This fact renders untenable Petitioner's argument that using an involuntary, self-incriminating statement against the defendant at a preliminary hearing does not "compel[]" the defendant "to be a witness against himself." U.S. Const. amend. V.

A person qualifies as a "witness" when their own "communication ... that relates either express or implied assertions of fact or belief" is used in court. *United States v. Hubbell*, 530 U.S. 27, 35 (2000). Because a preliminary hearing is an adversarial proceeding before a judicial officer, when a criminal defendant's self-incriminating statement is presented at such a hearing, the defendant has been made a witness. And because the purpose of the preliminary hearing is to advance the government's prosecution of the defendant, such use makes the defendant "'a witness against himself' under any plausible definition of the term." Resp't Br. 2 (quoting U.S. Const. amend. V).

In Petitioner's view, a defendant cannot be "a witness against himself" until and unless he is compelled to testify—live or through introduction of a compelled, self-incriminating statement—at his criminal trial. *See* Pet'r Br. 6. This position defies logic. Not every criminal prosecution requires a preliminary hearing. But in every criminal prosecution that has a preliminary hearing, the prosecutor must prevail at that proceeding in order to obtain a conviction. If the prosecutor fails to demonstrate probable cause at the preliminary hearing, the prosecution ends. The preliminary hearing thus arises in the context of, and is a necessary step in, the government's effort to obtain a conviction. It follows that to use a defendant's compelled statement against him in such a hearing is part and parcel of the defendant's path to conviction.

Petitioner dodges this axiomatic conclusion by analogizing to grand jury proceedings. Pet'r Br. 19-21. But the analogy fails precisely because the grand jury is not an adversarial proceeding before a judicial officer after criminal charges have been initiated. To be sure, the Constitution does not require States to provide preliminary hearings instead of grand jury proceedings, but once a State chooses to initiate criminal charges by complaint such that the prosecutor must prove probable cause at a preliminary hearing, the Self-Incrimination Clause applies.

B. Limiting the Self-Incrimination Clause's application to the criminal trial itself would severely prejudice defendants.

Preliminary hearings do not require proof beyond a reasonable doubt, but only probable cause. Comparatively, the burden of proof to require a trial after such a hearing is low. LaFave et al., *supra*, § 14.3(a). This fact exacerbates the danger of permitting a defendant's compelled statements to be used against him in a preliminary hearing. A prosecutor will often be able to prove probable cause solely on the basis of a compelled statement made by the defendant. *See, e.g.*, *Rayyis v. Super. Ct.*, 35 Cal. Rptr. 3d 12, 23 (Cal. Ct. App. 2005); *People v. Melotik*, 561 N.W.2d 453, 455 (Mich. Ct. App. 1997); *State v. Moats*, 457 N.W.2d 299, 302 (Wis. 1990). Were this Court to conclude that the Self-Incrimination Clause does not bar use of a compelled statement at a preliminary hearing, criminal defendants would suffer severe prejudice.

1. Preliminary hearings use a probable cause standard, which is a low burden of proof. This standard generally requires a judicial officer to determine that "there is probable cause to believe an offense has been committed and the defendant committed it." *State v. Carlson*, 845 N.W.2d 827, 832 (Minn. Ct. App. 2014) (quoting Minn. R. Crim. P. 3.02); *Sheriff v. Witzenberg*, 145 P.3d 1002, 1009 (Nev. 2006); *State v. Clark*, 825 A.2d 803, 804 (Vt. 2003). Exactly what "probable cause" means has often been left to judicial interpretation. Some courts define probable cause in this context as

"substantially less proof than beyond a reasonable doubt." LaFave et al., *supra*, § 14.3(a); *accord, e.g.*, *State v. Haukos*, 847 N.W.2d 270, 279 (Minn. Ct. App. 2014); *State v. Lownes*, 499 N.W.2d 896, 898-99 (S.D. 1993). Others define it as "only some evidence from which a reasonable person could infer the presence of that element." LaFave et al., *supra*, § 14.3(a); *accord, e.g.*, *State v. McLellan*, 294 P.3d 203, 204-05 (Idaho 2013); *Witzenberg*, 145 P.3d at 1004 n.6; *People v. McBride*, 516 N.W.2d 148, 150 (Mich. Ct. App. 1994). Still others borrow the probable cause standard for arrest, requiring "evidence that is sufficient to induce a person of ordinary prudence and caution to entertain a reasonable belief that the defendant committed the crime charged." LaFave et al., *supra*, § 14.3(a); *accord, e.g.*, *People v. Dist. Court, 17th Judicial Dist.*, 926 P.2d 567, 570 (Colo. 1996); *State v. Bockert*, 893 P.2d 832, 835 (Kan. 1995); *In re Keijam T.*, 602 A.2d 967, 970-971 (Conn. 1992). In most cases, a self-incriminating statement can, on its own, satisfy any of the three defined standards and allow the felony charge to proceed.

Allowing the prosecutor to proceed to trial based on a defendant's self-incriminating statement—without adjudication arguments that the Constitution prevents the statement from being considered as evidence against the defendant—undermines the screening purpose of preliminary hearings. It could result in trials for cases that lack sufficient admissible evidence. Allowing such cases to proceed beyond the preliminary hearing is both

inefficient and unjust. But it is particularly frightening when considered in concert with the fact that nearly all cases end with pleas. Because for many defendants the preliminary hearing is the apex of their case—an adversarial hearing before a judicial officer responsible for safeguarding their rights and upholding the law—it is particularly important that constitutional rights, including the Self-Incrimination Clause, apply at that hearing. Any time a prosecutor relies on a defendant's involuntary statement to show probable cause at a preliminary hearing, the defendant's constitutional rights have been violated. Even worse is where a defendant pleads guilty before having an opportunity to challenge the admissibility of the statement.

Postponing consideration of challenges under the Self-Incrimination Clause until trial therefore harms defendants and distorts the criminal justice system by undermining the screening function that is the *raison d'être* of the preliminary hearing. Allowing a felony charge to proceed to trial based on use of a defendant's statement—without full and fair consideration of the constitutionality of such use under the circumstances specific to that statement—could lead to a guilty plea even if the prosecutor lacks sufficient admissible evidence by which to prove guilt beyond a reasonable doubt. It is no answer to say that a challenge to the voluntariness of the defendant's statement can be raised later in the criminal process through a motion to suppress, because for many defendants, that will be too late. While many factors contribute to a guilty plea, a

judicial officer's initial finding of probable cause sufficient to hold a defendant for trial cannot be dismissed. Indeed, some States prohibit any plea until after the conclusion of the preliminary hearing. *See e.g.*, Wis. Stat. § 970.03(3) (2015-16). The judicial imprimatur provided by a probable cause determination at the preliminary hearing, while based on a lower standard of proof than needed for conviction, may suggest to a defendant that the prosecution is on its way to prevailing at trial.

A guilty plea elicited after a probable cause determination that was itself based on evidence inadmissible at trial because it violates the defendant's constitutional rights is contrary to the purposes of the Fifth Amendment. This Court has based several applications of the Self-Incrimination Clause on the precept that "an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage." *Tucker*, 417 U.S. at 440-41. So, too, here. Were the Court to hold that self-incrimination challenges must be deferred until after the preliminary hearing, it would be forcing defendants to make a Hobson's choice: wait until they are able to challenge the constitutionality of their self-incriminating statement (without any guarantee of success),[5] or accept a plea deal now,

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[5] "[T]he vast majority of motions to suppress are denied. Many of those denials, however, are likely not a direct reflection of the merits of the defendants' claims." Michael D. Pepson & John N. Sharifi, Lego v. Twomey: *The Improbable Relationship Between an Obscure Supreme Court Decision and Wrongful* (continued)

while it is extended. Such a dilemma lays bare the fundamental unfairness of allowing a defendant's self-incriminating statement to be used at a preliminary hearing without also allowing a constitutional challenge to that use, and it undermines the sound policy rationale that has led some States to require the prosecution to make a showing of probable cause before accepting a guilty plea.

Deferring self-incrimination challenges until trial would also undermine the additional purposes that preliminary hearings serve in practice. Allowing prosecutors to rely on a defendant's involuntary statement limits the quantum of other evidence that the prosecutor must present to obtain a probable cause determination. It therefore shortchanges the defendant's ability to use the preliminary hearing to assess the strength of the prosecution's case. *See Coleman*, 399 U.S. 9. Because reliance on the defendant's statement allows the prosecutor to hold back more of the evidence and witnesses that might be used at trial, the preliminary hearing is not useful as a means to lay groundwork for impeachment, to preserve evidence, or even to facilitate informed plea negotiations. *See id.* at 9. And, because the use of a defendant's statement at the preliminary hearing

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Convictions, 47 Am. Crim. L. Rev. 1185, 1192 & n.37 (Summer 2010) ; *cf. United States v. Bennett*, 514 A.2d 414, 417 (D.C. 1986) (Mack, J., dissenting) ("Without reference to statistics, I believe I can say with some degree of confidence, that the vast majority of motions to suppress evidence are denied by the trial courts.").

allows the prosecutor to shield other evidence not only from the defendant but also from the court, this practice limits the preliminary hearing's possibility of providing further data points that would allow the court—*sua sponte* or at the defendant's urging—to revisit prior determinations regarding bail or conditions imposed upon pretrial release. *See id.* at 9.

2. Allowing a charge to proceed on the basis of a defendant's compelled statement also creates systemic harms. Because double jeopardy does not attach until a jury is impaneled, LaFave et al., *supra*, § 25.1(d), a prosecutor has little incentive not to rely upon a defendant's compelled statement for as much of the pretrial criminal process as the courts will allow. As earlier noted, doing so might influence the defendant to accept a guilty plea. And, even if the defendant refuses to plead guilty and the statement is subsequently suppressed, the prosecutor can have another bite at the apple. If necessary, the prosecutor can dismiss the case, request additional investigation, and refile the charges based on any new evidence uncovered. To maintain the integrity of the criminal justice system, the Court must recognize a defendant's constitutional right against a prosecutor using a compelled statement at a preliminary hearing. Refusing to allow preliminary hearings to proceed on statements that violate the Self-Incrimination Clause would discourage prosecutors from bringing felony charges that they might not be able to prove at trial.

C. The government's policy concerns do not withstand scrutiny.

The United States, participating as amicus, offers a number of doomsday predictions about harms that will allegedly follow from prohibiting the use of compelled, self-incriminating statements at preliminary hearings. As an initial matter, the government's dire predictions for the criminal justice system ignore reality. The Self-Incrimination Clause already applies at preliminary hearings as a matter of settled law in the Second, Seventh, and Ninth Circuits. *See Stoot*, 582 F.3d at 924; *Best*, 554 F.3d at 1257; *Higazy*, 505 F.3d at 179. The government cites no evidence that any of the policy concerns it raises have disrupted criminal justice in these Circuits—or in the Tenth Circuit since it issued the decision below. Nor can the government's concerns, considered on their own merits, withstand scrutiny.

First, the United States argues that determining the admissibility of a compelled statement will burden the courts when preliminary hearings are intended to be informal, expeditious, and focused on preliminary issues such as bail and probable cause "unrelated to guilt or punishment." U.S. Br. 26. Not so. The primary purpose of a preliminary hearing is to determine whether the prosecution has sufficient evidence for the criminal case to proceed to trial. This screening function means that the preliminary hearing is inextricably related to the process of determining whether the defendant is guilty; it is the defendant's first opportunity to establish that the prosecution cannot meet its burden and therefore

have the case dismissed. Moreover, as discussed above, the preliminary hearing serves other functions as well, which are also disrupted when probable cause is found on the basis of a defendant's involuntary statement.

Second, the United States improperly privileges judicial efficiency over a defendant's constitutional rights. U.S. Br. 26-27. This Court has held that the goal of streamlining prosecutions cannot trump individual rights. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325 (2009) ("The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience."). That constitutional rights take precedence over judicial efficiency is a bedrock principle of our justice system. "The imperative to safeguard individuals from compelled self-incrimination 'transcends any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime.' *United States v. White*, 322 U.S. 694, 698 (1944)." Resp't Br. 49.

The same principle disposes of the observation that federal magistrate judges lack authority to suppress evidence in a pre-indictment preliminary examination. U.S. Br. 29. This fact does not illuminate the constitutional issue at stake. To the extent that the Fifth Amendment determination disrupts existing criminal procedures (as the

government fears), fidelity to the constitutional guarantee necessitates a procedural change.

Third, the United States argues that questions over the admissibility of a defendant's statement are too difficult to decide at a preliminary hearing. U.S. Br. 27-28. Specifically, the government worries that legal determinations regarding whether a defendant's statement was compelled are complex. U.S. Br. 27. But there is no reason to fear that a court could not effectively resolve suppression issues in the context of a preliminary hearing. Indeed, courts already adjudicate Fifth Amendment issues at preliminary stages. For example, so-called *Kastigar* hearings may be held before trial to review the sources of evidence used to prosecute a previously immunized witness. *See e.g., United States v. Frumento*, 552 F.2d 534, 542 n.14 (3d Cir. 1977). In weighing probable cause at such a hearing, the court cannot consider compelled statements. Moreover, *Kastigar* hearings show that courts can and do delve into issues raised by compelled statements early in criminal proceedings. Similarly, as noted above, several Circuits have adopted a rule allowing self-incrimination challenges at preliminary hearings, without ill effect. Affirming the ruling below will not impose a unique or undue burden.

Fourth, the United States's argument that probable cause hearings happen too soon after a criminal case has been filed for the guarantee against self-incrimination to apply also fails. U.S. Br. 30. It cannot be too soon for the prosecutor, who decides when to file felony charges and is expected

not to do so until ascertaining that the government has sufficient admissible evidence to prove guilt beyond a reasonable doubt at trial. Nor can it be too soon for the criminal defendant whose rights the Self-Incrimination Clause safeguards. No one has suggested—and the government surely does not mean to argue—that a defendant who lacks sufficient information at a preliminary hearing to challenge a compelled self-incriminating statement is thus foreclosed from seeking to suppress the statement prior to its anticipated use at trial. Such a theory would undermine "[t]he essence" of the Self-Incrimination Clause's "requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Mitchell v. United States*, 526 U.S. 314, 326 (1999) (emphasis and internal quotation marks omitted).

Fifth, the United States engages in tautology when it argues that applying the Self-Incrimination Clause to pretrial proceedings has no logical end point. U.S. Br. 30. The government seems to suggest that a defendant's introduction of a statement for the narrow purpose of challenging the constitutionality of the prosecution using the statement as evidence would in and of itself compel the defendant to be a witness against himself. *Chavez*'s determination that violation of the right against self-incrimination, at a minimum, requires "the initiation of legal proceedings" as well as the "use" of statements in those proceedings defeats this argument. *Chavez*,

538 U.S. at 766-77. So does logic. Of course a defendant does not concede the admissibility of an involuntary statement by placing it before court solely to raise a constitutional challenge to its admissibility against him. Courts have experience fencing off admissibility determinations from weighing the merits of the case. The United States makes no showing that this circumstance would be any different.

Additionally, as noted above and by Respondent, the government's position carries a chilling implication. By the United States's logic, the Fifth Amendment would not prevent a prosecutor from compelling a defendant to take the witness stand and forcing him to testify against himself at a preliminary hearing, as long as the testimony would not be used at trial. Such a scenario is inimical to the absolute protections this Court has long understood the Self-Incrimination Clause to confer. *See, e.g.*, *Malloy*, 378 U.S. at 7-8; *Mitchell*, 526 U.S. at 326. A ruling that countenances such a practice would be a substantial and deleterious change in constitutional doctrine.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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In The Supreme Court of the United States

CITY OF HAYS, KANSAS,

Petitioner,

v.

MATTHEW JACK DWIGHT VOGT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE NATIONAL FRATERNAL ORDER OF POLICE, AS AMICUS CURIAE IN SUPPORT OF RESPONDENT MATTHEW JACK DWIGHT VOGT

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QUESTION PRESENTED

Whether the Tenth Circuit Court of Appeals correctly held that the Fifth Amendment applies not only to the prosecution's use of compelled statements at a criminal trial, but also to the prosecution's use of such statements in pretrial proceedings, including probable cause hearings.

TABLE OF CONTENTS

Page

Question Presented i

Statement of Interest of *Amicus Curiae* 1

Summary of Argument 3

Argument 3

I. Police Officers Deal with *Garrity* Issues Every Day and Must be Afforded Adequate Fifth Amendment Protection 5

A. The present case is illustrative of the daily challenges faced by police officers in asserting their constitutional right against self-incrimination 8

B. The Tenth Circuit correctly held that the Fifth Amendment is violated when incriminating statements are compelled and used in a probable cause hearing 9

II. The Proper Scope of *Garrity* and Fifth Amendment Protection Extends to Pretrial Proceedings, Not Just a Criminal Trial 10

A. There is substantial precedent supporting pretrial protection under *Garrity* 10

B. The principles expounded in *Kastigar* serve as a foundation to hold that the right against self-incrimination, as enumerated in the Fifth Amendment and *Garrity*, attaches to pretrial proceedings 19

TABLE OF CONTENTS – Continued

Page

C. Applying the FOP's position to present case 22

Conclusion..... 28

TABLE OF AUTHORITIES

Page

CASES

Brokers' Choice of Am., Inc. v. NBC Universal, Inc.,
861 F.3d 1081 (10th Cir.2017).....24

Chavez v. Martinez,
538 U.S. 760 (2003) 3, 20, 24

Gardner v. Broderick,
392 U.S. 273 (1968) 7

Garrity v. New Jersey,
385 U.S. 493 (1967) .....*passim*

Kastigar v. United States,
406 U.S. 441 (1972) .....*passim*

Malloy v. Hogan,
378 U.S. 1 (1964) 9

Minnesota v. Murphy,
465 U.S. 420 (1984) 13

Oladeinde v. City of Birmingham,
230 F.3d 1275 (11th Cir. 2000).....4

Renda v. King,
347 F.3d 550 (3d Cir.2003).....2

State of Ohio v. Jackson,
927 N.E.2d 574 (Ohio 2010).....17

U.S. v. North (North I),
910 F.2d 843 (D.C. Cir. 1990) 14, 15

U.S. v. North (North II),
920 F.2d 940 (D.C. Cir. 1990) 14, 15

U.S. v. Pantone,
634 F.2d 716 (3d Cir. 1980) 16, 27

TABLE OF AUTHORITIES – Continued

Page

Uniformed Sanitation Men Ass'n v. Commr. of Sanitation, 392 U.S. 280 (1968) 7

United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973) 2, 15, 21, 27

United States v. Vangates, 287 F.3d 1315 (11th Cir. 2002) ..... *passim*

Vogt v. City of Hays, 844 F.3d 1235 (10th Cir. 2017) 9, 17, 24

Wiley v. Mayor & City Council of Baltimore, 48 F.3d 773 (4th Cir. 1995) 17

CONSTITUTION AND STATUTES

18 U.S.C. § 6002 14

42 U.S.C. § 1983 12

U.S. Const., amend XIV 1, 9

U.S. Const., amend. V ..... *passim*

OTHER

J. Michael McGuinness, *Fifth Amendment Protection for Public Employees:* Garrity *and Limited Constitutional Protections from Use of Employer Coerced Statements in Internal Investigations and Practical Considerations*, 24 Touro L. Rev. 695, 730 (2013) 8, 20

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The National Fraternal Order of Police (FOP) is the world's largest organization of sworn law enforcement officers, with more than 325,000 members in more than 2,100 lodges. The FOP is the voice of those who dedicate their lives to protecting and serving our communities, representing law enforcement personnel at every level of crime prevention and investigation nationwide.

The FOP's perspective on the issue presented in this case is both unique and significant for law enforcement personnel around the country. Specifically, the Court's disposition on whether the Fifth Amendment is violated when compelled statements are used at a probable cause hearing, but not at a criminal trial, necessarily implicates and resolves officers' rights as enumerated in *Garrity v. New Jersey*, 385 U.S. 493 (1967).

In *Garrity*, this Court held that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits *use in subsequent criminal proceedings* of statements obtained under

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[1] In accordance with Rule 37.6, the FOP and undersigned counsel make the following disclosure statements. The submission of this Brief was consented to by all parties hereto. The Office of General Counsel to the National Fraternal Order of Police authored this Brief in its entirety. There are no other entities which made monetary contributions to the preparation or submission of this Brief. In addition, Petitioner and Respondent have consented in writing to the filing of this Brief and have notified the Clerk that they consent to the filing of *amicus* briefs in support of either or neither party.

threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." *Id.* at 500 (emphasis added). Courts around the country have interpreted this differently. Some courts limit "criminal proceedings" to criminal trial. *See, e.g.*, *Renda v. King*, 347 F.3d 550, 552 (3d Cir.2003) (noting "there is no claim that the plaintiff's answers were used against her at trial.").

Other courts, by contrast, have interpreted "criminal proceedings" to mean coerced statements protected by *Garrity* cannot be used in trial preparation, interpreting evidence, or even planning trial strategy. *See, e.g.*, *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973) (requiring government to prove that it did not use immunized testimony "in some significant way short of introducing tainted evidence," and that "[s]uch use could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy");

This split in circuit interpretation on the extent of *Garrity* protection mirrors the circuit split on the scope of Fifth Amendment protection against self-incrimination before this Court today. The Court's decision on this issue will generate a common answer for *Garrity* rights, which the FOP deals with every day.

SUMMARY OF ARGUMENT

In essence, the issue certified by this Court is whether the Fifth Amendment privilege against self-incrimination and the related protections afforded by *Garrity v. New Jersey*, 385 U.S. 493 (1967), work to prohibit use of compelled statements in pretrial proceedings or whether the prohibition vests only upon commencement of a criminal trial.

In response to the question presented, the FOP respectfully submits that an officer's *Garrity* rights vest at the time a statement is compelled under threat of adverse employment action, and any such statement cannot be used in *any* subsequent criminal investigations or proceedings *including* probable cause hearings. To stop short of this position "strips the [Fifth Amendment and *Garrity* rights] of an essential part of [their] force and meaning." *Chavez v. Martinez*, 538 U.S. 760, 793 (2003) (Kennedy, J., concurring in part and dissenting in part). Indeed, as this Court recognized fifty years ago, police officers "are not relegated to a watered-down version of constitutional rights." *Garrity*, 385 U.S. at 500.

ARGUMENT

The Fifth Amendment of the United States Constitution provides that: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. Const., amend. V. On its face, the right against self-incrimination seems clear and

straightforward. In application, however, the permissible use of compelled statements or testimony is far less evident. This is particularly true when dealing with public employees such as police officers.

Police officers in the United States serve in a unique employment environment. Officers serve in the line of duty with each other – often developing close relationships and loyalties with their peers. Police officers also serve in a defined hierarchy, answering to a commanding officer in a "quasi-military" chain of command. *See generally Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1293 (11th Cir. 2000). With this unique employment structure comes difficult questions about how to best protect individual liberties such as the right against self-incrimination. Answering to a commanding officer and friend can feel like more than a mere request from an employer and runs the risk of unduly burdening police officers' Fifth Amendment protection against self-incrimination. *Garrity*, 385 U.S. at 496 (noting that "subtle pressures may be as telling as coarse and vulgar ones."); *see also United States v. Vangates*, 287 F.3d 1315, 1321 (11th Cir. 2002).

To protect against these concerns, this Court recognized that the Fifth Amendment ensures employees are not left to choose between their livelihood and self-incrimination. *Garrity*, 385 U.S. at 497.

I. POLICE OFFICERS DEAL WITH *GARRITY* ISSUES EVERY DAY AND MUST BE AFFORDED ADEQUATE FIFTH AMENDMENT PROTECTION.

Imagine this scenario: a police officer sits down with an Internal Affairs investigator who asks questions about his involvement in detaining a suspect who alleges officers used excessive force to subdue him. The investigator tells the officer that any statements he makes are purely for an administrative investigation and will not be used against him in any future criminal proceedings. The investigator also makes it clear that refusal to answer questions will lead to termination. During the course of this interview, the officer makes incriminating statements about the circumstances surrounding the suspect's arrest. The investigator then refers the statement to a prosecutor who previously had no knowledge of any potentially unlawful conduct prior to receiving the officer's statement. The prosecutor then initiates a criminal investigation and charges the officer with a crime based solely on the officer's own compelled statement.

Once charged, the officer is detained pending a criminal trial. The officer is also suspended from his post and the local media reports that the officer may have violated the suspect's constitutional rights. After months of investigating leading up to trial, however, the prosecutor is unable to substantiate any criminal case and the charges are dismissed.

The Petitioner argues that the above situation would not constitute a violation of the Fifth Amendment or *Garrity*. *See* Pet'r's Br. at 5-6. This is so even though the officer's statement was compelled under threat of termination and procured through misrepresentations that the statement wouldn't be used in any subsequent criminal proceedings. According to Petitioner's logic, the fact that the criminal investigation and criminal proceedings were launched solely on the basis of the officer's own compelled statements would not constitute a violation of the Fifth Amendment. The fact that the officer would be bound over – suffering lost freedom – while awaiting criminal trial would not constitute a violation of the Fifth Amendment. Even worse, the officer would also face many collateral consequences beyond criminal punishment including reputational harm and lost employment despite no ultimate finding of guilt.

Now reimagine these same foundational facts. The officer is questioned by an investigator who says the inquiry is purely for an administrative investigation and any subsequent statement will not be used against him in any future criminal proceedings. The investigator also makes it clear that refusal to answer questions and provide a statement will lead to termination. This time, however, the officer expressly invokes his Fifth Amendment right against self-incrimination and remains silent. Without a compelled statement from the officer, which the above hypothetical had, no criminal proceedings are initiated and no charges are ever filed. Stated differently, because there was no statement

upon which to base an investigation as was the case in the earlier hypothetical, no criminal proceeding could be initiated.[2]

The Constitution and this Court's prior rulings simply do not mandate these divergent results, and that is what is at stake if Petitioner's view point is adopted.

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[2] Depending on the circumstances surrounding the officer's refusal to provide a statement, the department may not even be able to terminate the officer. *See Uniformed Sanitation Men Ass'n v. Commr. of Sanitation*, 392 U.S. 280, 283–84 (1968) (prohibiting states from firing employees who refused to waive constitutional privilege and answer questions. The Court noted that "[p]etitioners were not discharged merely for refusal to account for their conduct as employees of the city. They were dismissed for invoking and refusing to waive their constitutional right against self-incrimination. . . . They were entitled to remain silent because it was clear that New York was seeking, not merely an accounting of their use or abuse of their public trust, but testimony from their own lips which, despite the constitutional prohibition, could be used to prosecute them criminally."); *Gardner v. Broderick*, 392 U.S. 273, 278 (1968) ("[T]he mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment"). This inquiry is beyond the scope of the issues before the Court today. The key point is that the officer is in a substantially different position when remaining silent than he is when giving a compelled statement.

A. THE PRESENT CASE IS ILLUSTRATIVE OF THE DAILY CHALLENGES FACED BY POLICE OFFICERS IN ASSERTING THEIR CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION.

The case before this Court today provides a representative and real-world example of both the problem outlined above and the challenges officers throughout the country face every day. As *Garrity* commentators have noted, "[v]irtually every incident where a public employee uses any force or has physical contact with anyone gives rise to a prospective criminal charge of assault and battery, a civil rights charge of excessive force, and an internal or administrative charge of misconduct under [an] agency's internal rules." J. Michael McGuinness, *Fifth Amendment Protection for Public Employees:* Garrity *and Limited Constitutional Protections from Use of Employer Coerced Statements in Internal Investigations and Practical Considerations*, 24 Touro L. Rev. 695, 730 (2013).

Beyond that, officers nationwide deal with *Garrity*-related questions in a variety of their daily job functions. Any time an officer is involved in an altercation where a firearm is discharged, a weapon used, a suspect complains of unlawful treatment, an inter-departmental complaint is filed, or an officer is required to supply a report by order of a commanding officer, the contours of *Garrity* are implicated.

B. THE TENTH CIRCUIT CORRECTLY HELD THAT THE FIFTH AMENDMENT IS VIOLATED WHEN INCRIMINATING STATEMENTS ARE COMPELLED AND USED IN A PROBABLE CAUSE HEARING.

The Fifth Amendment of the United States Constitution provides in pertinent part: "No person . . . shall be compelled *in any criminal case* to be a witness against himself. . . ." U.S. Const., amend. V (emphasis added).[3]

The Tenth Circuit's decision correctly interpreted this constitutional guarantee, acknowledging that "[t]he Fifth Amendment is violated when criminal defendants are compelled to incriminate themselves and the incriminating statement is used in a probable cause hearing." *See Vogt v. City of Hays*, 844 F.3d 1235, 1237 (10th Cir. 2017). In so holding, the court below correctly determined that Fifth Amendment protection vests well before a formal criminal trial. *Id.* at 1241–42.

By extension, the Tenth Circuit's rationale also applies to *Garrity* statements. *Garrity* is designed to extend the Fifth Amendment privilege against self-incrimination to police officers – and all employees – in the employment context. *Garrity*, 385 U.S. at 500. If the Fifth Amendment is violated by virtue of a compelled

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[3] The Fifth Amendment's Self-Incrimination Clause is applicable to the States through the Fourteenth Amendment. *See Malloy v. Hogan*, 378 U.S. 1, 6 (1964); U.S. Const., amend XIV.

statement, the fact that the compelled statement is a *Garrity* statement does not change the permissible use of the testimony. Indeed, a *Garrity* statement is, by definition, compelled testimony. *Id.* at 496.

II. THE PROPER SCOPE OF *GARRITY* AND FIFTH AMENDMENT PROTECTION EXTENDS TO PRETRIAL PROCEEDINGS, NOT JUST A CRIMINAL TRIAL.

The FOP respectfully submits that *Garrity* rights vest at the time a statement is compelled under threat of adverse employment action. Once such a statement is elicited, it shall not be used in *any* subsequent criminal investigation or proceeding *including* probable cause hearings. This position is consistent with the text and scope of the Fifth Amendment privilege against self-incrimination.

A. THERE IS SUBSTANTIAL PRECEDENT SUPPORTING PRETRIAL PROTECTION UNDER *GARRITY*.

The seminal case on the scope of Fifth Amendment protection when testimony is compelled and used in subsequent proceedings is *Kastigar v. United States*, 406 U.S. 441 (1972). In *Kastigar*, the petitioners were subpoenaed to appear before a United States grand jury. *Id.* at 442. The government, anticipating that the petitioners would assert their Fifth Amendment privilege, obtained an order from a California Federal District Court directing the petitioners to provide

testimony and evidence before a grand jury under grant of immunity. *Id.* The petitioners appeared before the grand jury but refused to answer questions or produce evidence, asserting their privilege against self-incrimination. *Id.* The district court found the petitioners in contempt and confined them until they answered the grand jury's questions or the term of the grand jury expired. *Id.*

The issue ultimately ended up before this Court, which was tasked with deciding "whether testimony may be compelled by granting immunity from the use of compelled testimony and evidence derived therefrom ('use and derivative use' immunity), or whether it is necessary to grant immunity from prosecution for offenses to which compelled testimony relates ('transactional' immunity)." *Id.* at 443.

This Court held that compelled testimony – and any fruits derived from such testimony – may not be used against an individual in a criminal case. *Id.* at 453. In so doing, the Court acknowledged that Fifth Amendment protection is akin to use and derivative use immunity. *Id.* (noting "[i]mmunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords [sufficient Fifth Amendment] protection."). The practical implication of this is that a person in question can be prosecuted for the offense under investigation, but the prosecution may not rely on the compelled testimony or any evidence derived from that compelled testimony to achieve an adjudication of guilt. Instead, the prosecution has an "affirmative duty to prove that the

evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Id.* at 460.

Following this Court's lead in *Kastigar*, many other courts around the country similarly extended protection to pretrial proceedings when individuals assert their Fifth Amendment right against self-incrimination. For example, in *United States v. Vangates*, the Eleventh Circuit was tasked with deciding "whether certain statements made by a correctional officer are protected under the Fifth Amendment to the Constitution and *Garrity*. . . ." 287 F.3d 1315, 1316 (11th Cir. 2002).

In *Vangates*, a correctional officer was convicted of obstruction of justice and a federal criminal civil rights violation. *Id.* at 1316–17. Vangates argued that her convictions should be reversed because the trial court erroneously concluded her testimony from a previous civil trial was admissible in the criminal case. *Id.* at 1319. During the civil case, the victim in the underlying dispute had filed an action under 42 U.S.C. § 1983 seeking damages for an assault she allegedly sustained when police arrested her. *Id.* During the civil trial, the plaintiff introduced evidence from the Internal Affairs investigative file, which included transcripts and tape recordings of interviews with police officers that were expressly protected by *Garrity* via a grant of use and derivative use immunity. *Id.* at 1318. The police officers did not object to the evidence when it was introduced during the civil trial. *Id.* at 1320.

While the civil suit was pending, plaintiff's counsel filed a civil rights complaint with the Federal Bureau of Investigation (FBI), which opened up an investigation on the arresting officers. *Vangates*, 287 F.3d at 1318. These actions culminated in an indictment from a grand jury charging the officers with two felonies. *Id.* A criminal action commenced and prior to the start of the criminal trial, the officers submitted motions in limine to exclude the Internal Affairs file containing their *Garrity* statements. *Id.* at 1319. The district court judge excluded the Internal Affairs investigatory file and all references in the testimony made to that file. *Id.* However, the judge permitted all other portions of the civil trial transcript not referencing the Internal Affairs investigation to be used in the criminal trial. *Id.* This included some incriminating testimony given by Vangates. *Id.* Vangates was subsequently convicted. *Vangates*, 287 F.3d at 1319. She appealed, contending that the district court erred in concluding that her civil trial testimony was not protected under *Garrity*. *Id.*

The Eleventh Circuit ultimately agreed with the district court's decision to exclude the Internal Affairs investigatory file but permit all portions of the civil trial transcript not referencing that file. *Id.* at 1321. In so deciding, the Eleventh Circuit explained that Fifth Amendment and *Garrity* protection extends *"to any 'proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'"* *Id.*, citing *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984) (emphasis added). Further, the Court

noted that while Vangates's testimony related to the Internal Affairs investigation was covered by *Garrity* under an express grant of immunity, that immunity did not apply to her civil trial testimony that did not mention the Internal Affairs investigation. *Id.* at 1321. The Eleventh Circuit clarified, however, that *"[e]ven absent an explicit grant of immunity. . . . Vangates's civil trial testimony still would be protected if she had been compelled to give it."* *Id.* (emphasis added).

Similarly, the D.C. Circuit considered the scope of Fifth Amendment privilege in *U.S. v. North (North I)*, 910 F.2d 843 (D.C. Cir. 1990), *opinion withdrawn and superseded in part on reh'g, U.S. v. North (North II)*, 920 F.2d 940 (D.C. Cir. 1990). North was a former member of the National Security Council and was called to testify before a congressional committee about illicit activity taking place during the Iran-Contra affair. *Id.* at 851. North asserted his Fifth Amendment right not to testify, but the government compelled his testimony with a grant of immunity under 18 U.S.C. § 6002. *Id.* North's six-day testimony was aired on national television and radio. *Id.* North was eventually convicted of three counts relating to the Iran-Contra scandal by a specially appointed Independent Counsel. *Id.* He appealed, arguing that his Fifth Amendment right was violated by the lower court's failure to require the Independent Counsel to establish independent sources for the testimony of witnesses before the grand jury and at trial and to demonstrate that the witnesses did not use his immunized testimony in any way. *Id.* at 853. North also

argued that his Fifth Amendment right was violated by the lower court's failure to determine whether the Independent Counsel made non-evidentiary use of his immunized testimony. *Id.*

The *North I* court concluded that any witness testimony based on North's immunized testimony was improper even if North's testimony was used merely "to refresh their memories, or otherwise to focus their thoughts, organize their testimony, or alter their prior or contemporaneous statements." *Id.* at 856. Upon rehearing, en banc, the *North II* court elaborated more poignantly:

> It simply does not follow that insulating prosecutors from exposure automatically proves that immunized testimony was not used against the defendant. *Kastigar* is instead violated whenever the prosecution puts on a witness whose testimony is shaped, directly or indirectly, by compelled testimony, regardless of how or by whom he was exposed to that compelled testimony.

United States v. North (North II), 920 F.2d 940, 942 (1990) (en banc).

Many other courts and resources have followed *Kastigar*, *Vangates*, *North I*, and *North II*'s reasoning that compelled statements must not be used even in pretrial proceedings:

- *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973) (holding that the government impermissibly used the

defendant's compelled testimony and noting impermissible investigatory uses of compelled testimony include: (1) focusing the investigation; (2) deciding whether to initiate prosecution; (3) refusing to plea bargain; and (4) planning trial strategy. The Eighth Circuit reasoned that "although [the prosecutor] asserts that he did not use [the immunized] testimony in any form, we cannot escape the conclusion that the testimony could not be wholly obliterated from the prosecutor's mind in his preparation and trial of this case." *Id.* at 312. The *McDaniel* court further noted that " . . . *if the immunity protection is to be coextensive with the Fifth Amendment privilege, as it must to be constitutionally sufficient, then it must forbid all prosecutorial use of the testimony, not merely that which results in the presentation of evidence before the jury.*" *Id.* at 311 (emphasis added));

- *U.S. v. Pantone*, 634 F.2d 716, 722 (3d Cir. 1980) (suggesting that use of immunized testimony, even as a morale booster to federal prosecutors, may be impermissible: "[i]t may be posited that mere access to the self-incriminating grand jury testimony could provide the United States Attorney a degree of psychological confidence he might otherwise lack, and therefore might imperceptibly affect the later trial");

- *Wiley v. Mayor & City Council of Baltimore*, 48 F.3d 773, 778 (4th Cir. 1995) (holding that since the protected statements weren't used, no *Garrity* violation occurred. The Court clarified, however, that *Garrity* rights are "self-executing" and that *"[o]f course, if the state had attempted to make direct or derivative use of the officers' statements against them, Garrity's self-executing immunity would have immediately attached."*) (emphasis added);

- *State of Ohio v. Jackson*, 927 N.E.2d 574, 578–82 (Ohio 2010) (holding that the State made two constitutionally impermissible uses of the defendant's *Garrity* statement. First, an investigator impermissibly testified before a grand jury, as that investigator was present when the defendant made a *Garrity* statement. This was an impermissible use even though the investigator never mentioned contents of the *Garrity* statement before the grand jury. Second, a prosecutor impermissibly reviewed the defendant's protected statement during trial preparation.);

- *Vogt v. City of Hays*, 844 F.3d 1235, 1239-46 (10th Cir. 2017) (holding that the phrase "criminal case" as stated in the Fifth Amendment includes probable cause hearings. The Tenth Circuit supported its decision by analyzing the historical antecedents of the Fifth

Amendment and other cases around the country holding the Fifth Amendment is not exclusively a trial right.);

- The United States Attorneys' Manual, Section 9-23.400 (recognizing that the government's ability to use compelled testimony is tied to *Kastigar*'s sweeping proscription on using fruits of the testimony against witnesses. Given *Kastigar*'s restrictions, the manual instructs government attorneys that the Attorney General must personally authorize prosecution of a person who has testified under immunity for an offense stemming from or closely related to his compelled testimony.).

The above cases clearly recognize a pretrial protection for compelled testimony by virtue of the Fifth Amendment and *Garrity*. In each case, the conduct giving rise to a constitutional violation occurred prior to the commencement of a criminal trial. These cases therefore support the broader proposition that pretrial conduct involving protected *Garrity* statements frequently infringes constitutional rights. In order to effectively provide protection against self-incrimination, the *Garrity* doctrine must be recognized from the outset of a criminal investigation or proceeding.

B. THE PRINCIPLES EXPOUNDED IN *KASTIGAR* SERVE AS A FOUNDATION TO HOLD THAT THE RIGHT AGAINST SELF INCRIMINATION, AS ENUMERATED IN THE FIFTH AMENDMENT AND *GARRITY*, ATTACHES TO PRETRIAL PROCEEDINGS.

Kastigar clarifies two vital points when considering the scope of Fifth Amendment and *Garrity* protection. First, the *Kastigar* Court decided that use and derivative use immunity provided protection commensurate with the right against self-incrimination guaranteed by the Fifth Amendment. *Kastigar*, 406 U.S. at 453. This decision, the Court noted, left parties in the same position they would have been in had they simply asserted the Fifth Amendment privilege without grant of immunity. *Id.* at 458–59, 462. Accordingly, *Kastigar* made clear that express immunity is not required to invoke Fifth Amendment protection. *Id.* But whether the individual has immunity or remains silent, they must be left in the same position constitutionally. *Id.*

Second, *Kastigar* stands for the broader proposition that there is no moratorium on the constitutional right against self-incrimination until some later action. 406 U.S. at 453-54. Many courts following this line of reasoning found impermissible uses of compelled testimony that occurred prior to the commencement of a criminal trial. *See, e.g.*, Section (II)(A), *supra*, at 10–18. Surely then, if a constitutional violation occurs as a result of pretrial conduct, no reason exists to consider that same conduct any less a violation if used only in

pretrial proceedings. Justice Kennedy puts it best: "A constitutional right is traduced the moment torture or its close equivalents are brought to bear. *Constitutional protection for a tortured suspect is not held in abeyance until some later criminal proceeding takes place.*" *Chavez*, 538 U.S. 789–90 (Kennedy, J., concurring in part and dissenting in part) (emphasis added).

This position makes sense because the individual against whom a compelled statement is used has presumably suffered actual punishment and harm between the time pretrial criminal proceedings commence and the criminal trial itself. For example, that individual would potentially be bound over for trial, consequently losing the freedom they had prior to their compelled testimony being used against them to commence a criminal prosecution. This individual is also now subjected to the possibility of a criminal conviction, which carries additional criminal punishments. They would also suffer ancillary social consequences. For example, they would likely lose their job or be suspended without pay. They would suffer the social stigma of being labeled a criminal, particularly if the incident is publicized. *See, e.g.*, J. Michael McGuinness, *Fifth Amendment Protection for Public Employees:* Garrity *and Limited Constitutional Protections from Use of Employer Coerced Statements in Internal Investigations and Practical Considerations*, 24 Touro L. Rev. 695, 730 (2013). (noting that "when a public employee becomes the subject of a criminal investigation the whole community will often know of the allegations quickly, courtesy of the media") (internal

citations omitted). Their family members would be forced to consider whether their parent, child, sibling, or significant other is a criminal.

Given these potential harms, why then would an individual have no constitutional protection until some vestige of the compelled statement is used at trial? This question is particularly difficult to answer when noting that many courts hold even knowledge of an incriminating compelled statement is a constitutional violation once a criminal trial commences. *See, e.g.*, *McDaniel*, 482 F.2d 305, 312 (reasoning that "although [the prosecutor] asserts that he did not use [the immunized] testimony in any form, we cannot escape the conclusion that the testimony could not be wholly obliterated from the prosecutor's mind in his preparation and trial of this case"). Petitioner's contrary argument that a criminal trial must commence for constitutional rights to be infringed injects a rigid distinction of when Fifth Amendment protection truly protects that simply cannot be reconciled with the Fifth Amendment's text and the *Garrity* Court's opinion. As Justice Kennedy has stated, to hold "*that the Self-Incrimination Clause is not violated until the government seeks to use a statement in some later criminal proceeding [would] strip[ ] the Clause of an essential part of its force and meaning.*" *Chavez*, 538 U.S. at 793 (Kennedy, J., concurring in part and dissenting in part) (emphasis added).

These are the precise concerns the FOP seeks to guard against. An officer's *Garrity* statement, compelled under threat of adverse employment action, must be protected from *any* subsequent criminal

investigations or proceedings. That is because the constitutional right was violated the moment his statements were compelled under threat of adverse employment action and provided to criminal investigators, not when a criminal trial commences.

Notably, the FOP does not seek broader protection than that already provided under *Kastigar*. *Kastigar* gives prosecutors permission to use a compelled statement in exchange for use and derivative use immunity. *Kastigar*, 406 U.S. at 458–59, 462. *Kastigar* simultaneously imposes an affirmative "heavy burden" on prosecutors to show – during any subsequent criminal proceedings – that they had independent evidence to convict, which is sufficient to protect an officer's Fifth Amendment rights as enumerated in *Garrity*. *Id.* at 460.

C. APPLYING THE FOP'S POSITION TO THE PRESENT CASE.

Officer Vogt worked with Hays police department. While working there he sought employment with Haysville police department in late 2013. *See* Pl.'s Compl., at ¶ 11. During the Haysville hiring process, Officer Vogt disclosed that he had kept a knife for his personal use after coming into possession of it in the course of his employment as a Hays police officer. *Id.* at ¶ 12. Notwithstanding this disclosure, Haysville offered Officer Vogt employment on the condition he report the knife to Hays police department. *Id.* at ¶ 13. Officer Vogt complied with Haysville's condition to

report the knife to his superiors at Hays police department. *Id.* at ¶ 15.

Upon making the disclosure, Officer Vogt was ordered by Chief Scheibler, as a condition of his employment as a Hays police officer, to file a written report about his possession of the knife. *Id.* at ¶ 16. Lieutenant Wright, who is responsible for internal investigations conducted by Hays police department, further compelled Officer Vogt to give a statement about the knife as a condition of his employment with Hays. *Id.* at ¶ 19. Lieutenant Wright also assured Officer Vogt that he was seeking only policy violations in an administrative review and was not conducting a criminal investigation. *See* Pl.'s Compl., at ¶¶ 19–20.

Using these compelled statements, the compelled report, and fruits from these sources, Chief Scheibler requested the Kansas Bureau of Investigation initiate a criminal investigation into Officer Vogt's conduct. *Id.* at ¶ 22. These actions culminated in a probable cause hearing to determine if Officer Vogt could be formally charged with two felonies and bound over for trial. *Id.* at ¶ 27.

Applying the FOP's position to facts of this case, Officer Vogt's *Garrity* rights vested and were implicated at the time Chief Scheibler and Lieutenant Wright ordered him – as a condition of his employment – to provide statements regarding the knife Officer

Vogt came into possession of during his employment with Hays.[4]

This case is a particularly salient illustration of why broad *Garrity* rights are needed. Here, Officer Vogt's commanding officer and the Internal Affairs investigator compelled Officer Vogt to incriminate himself under the guise of an administrative review. Pl.'s Compl., at ¶¶ 16, 19–20. Officer Vogt then provided evidence which provided the sole basis for the Kansas Bureau of Investigation to initiate pretrial criminal proceedings.

Fortunately for Officer Vogt, the district court found there was not sufficient probable cause to

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[4] This Court need not decide whether Officer Vogt's statements were actually compelled to determine if a *Garrity* violation occurred. When deciding a motion to dismiss, the District Court was required to view all well-plead facts, and reasonable inferences therefrom, as true. *See Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1105 (10th Cir.2017) (stating "[i]n ruling on a motion to dismiss for failure to state a claim, '[a]ll well-pleaded facts . . . must be taken as true,' and the court must liberally construe the pleadings and make all reasonable inferences in favor of the non-moving party"); *see also Vogt v. City of Hays*, 844 F.3d 1235, 1246 n.7 (10th Cir. 2017) (noting that "Mr. Vogt's complaint states that the 'compelled statements and fruits thereof were used against him in a criminal case. . . .' At this stage, we can reasonably infer that these statements were used to support probable cause"); Pet'r's Br., at 26 ("[g]iven the procedural posture of this case – a motion to dismiss for failure to state a claim – we must assume that Vogt's statements were 'compelled' within the meaning of the Fifth Amendment"). Accordingly, Officer Vogt's allegations in the Complaint that his statement was compelled under threat of adverse employment action, Pl.'s Compl., at ¶¶ 16, 19–22, must be taken as true and are sufficient to demonstrate a *Garrity* violation at the motion to dismiss stage.

formally charge him and bind him over for trial. What if, however, the district court had found probable cause based on Officer Vogt's compelled statement? If that had occurred, Officer Vogt would have been detained while awaiting a criminal prosecution. He would have also suffered collateral consequences such as lost employment and negative social stigma from the pending criminal charges. These additional harms, while ancillary, are very real consequences that should not be overlooked.

If this Court holds that Fifth Amendment rights do not vest until a compelled statement is used during criminal trial, then Officer Vogt – and every police officer facing similar circumstances – will have absolutely no recourse while waiting to defend their name. Significantly, this result would hold true even if no outside evidence materialized to convict him and charges were subsequently dropped before a criminal trial commenced.

As Justice Kennedy noted, "[t]his is no small matter." *Chavez*, 538 U.S. at 793 (Kennedy, J., concurring in part and dissenting in part). Law enforcement personnel around the country face situations every day that implicate officers' *Garrity* rights. What should law enforcement personnel do when confronted with reporting obligations if there is no guarantee that statements they provide will be protected during any subsequent criminal proceeding short of a criminal trial? This puts officers in an impossible situation where they must speculate about the extent of their constitutional rights when deciding to answer any

question or fill out any report put to them by an administrative superior or commanding officer. This could turn even the most basic officer-reporting functions into complex questions of constitutional law.

Some clarity is necessary here. The FOP does not contend that Hays and the government would be precluded from disciplining or prosecuting Officer Vogt if they believe he has acted unlawfully. Hays may reprimand Officer Vogt in an administrative manner.[5] The prosecutor may prosecute Officer Vogt provided he can produce evidence to support a criminal action that is wholly separate from the information Officer Vogt reported under compulsion. The prosecutor could, for example, investigate leads based upon Officer Vogt's initial, voluntary statement and pursue criminal charges. But here, the criminal investigation and proceedings were initiated solely using Officer Vogt's compelled statement and fruits derived from that statement. Once the investigation is launched using Officer Vogt's compelled statement, a constitutional violation has occurred. That is because the compelled statement has now poisoned the mind of the

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[5] In this unique factual pattern, nothing would preclude Hays police department from calling the prosecutor and relaying Officer Vogt's initial, *voluntary*, statement about coming into possession of a knife during the course of his employment as a police officer. Officer Vogt's initial statement is not constitutionally protected because he initiated contact with his superiors and made disclosures voluntarily. Hays could not, however, relay to the prosecutor any information that was provided solely in Officer Vogt's compelled statement protected under *Garrity* without implicating Fifth Amendment rights.

prosecutor and may imperceptibly impact the course of any subsequent criminal investigation or proceeding. *See, e.g.*, *Pantone*, 634 F.2d at 722 (suggesting that use of immunized testimony, even as a morale booster to federal prosecutors, may be impermissible: "[i]t may be posited that mere access to the self-incriminating grand jury testimony could provide the United States Attorney a degree of psychological confidence he might otherwise lack, and therefore might imperceptibly affect the later trial"); *McDaniel*, 482 F.2d at 311 (holding that the government impermissibly used the defendant's compelled testimony and noting impermissible investigatory uses of compelled testimony include: (1) focusing the investigation; (2) deciding whether to initiate prosecution; (3) refusing to plea bargain; and (4) planning trial strategy).

For the Fifth Amendment and *Garrity* to provide true protection, officers must be given assurances that their *Garrity* statements cannot and will not be used to incriminate them in *any* manner. Indeed, as this Court already noted in *Kastigar*, a primary goal of Fifth Amendment application is to put an individual under compulsion at parity, rights-wise, with an individual in the same situation who simply remains silent. *Kastigar*, 406 U.S. at 458–59, 462. *Kastigar* does this by immunizing the compelled testimony – and all fruits derived therefrom – and by imposing on the government "the heavy burden of proving that all of the evidence it proposes to use *was derived from legitimate independent sources*." *Id.* at 461–62 (emphasis added). That goal is not achieved if protection against

self-incrimination for compelled statements turns on whether the compelled statement is ultimately introduced in some manner at trial.

CONCLUSION

The FOP represents a broad segment of this Nation's police personnel. These individuals serve our communities and put their lives on the line every day to ensure our protection. With this great responsibility comes a heavy burden. Our officers are often put in challenging situations, not all of which have perfect outcomes. In those instances where further explanation or reporting is required by law enforcement personnel, there must be sufficient assurances that officers' constitutional rights under the Fifth Amendment and *Garrity* are carefully preserved.

Accordingly, and for the foregoing reasons, the FOP respectfully requests this Court hold that a statement compelled in contravention of the Fifth Amendment and *Garrity* shall not be used in *any* subsequent criminal investigation or proceeding, *including* probable cause hearings. Such a holding would be consistent with the principle this Court has already articulated:

that police officers "are not relegated to a watered-down version of constitutional rights." *Garrity*, at 500.

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No. 16-1495

IN THE

Supreme Court of the United States

CITY OF HAYS, KANSAS,

Petitioner,

v.

MATTHEW JACK DWIGHT VOGT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF STATE AND LOCAL GOVERNMENT EMPLOYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. The Tenth Circuit's decision pressures government employers to be less vigilant in discovering and correcting employee misconduct	5
II. The Court should make clear that government employers are not liable for the decisions of prosecutors over whom they have no control	12
A. Municipal liability cannot be imposed under § 1983 because the City of Hays did not control the prosecutorial decision to use Vogt's statement in the criminal case	12
B. The sole and exclusive remedy for the alleged violation is the exclusion of the compelled statement	14
CONCLUSION	18

TABLE OF AUTHORITIES

CASES Page(s)

Arnett v. Kennedy,
416 U.S. 134 (1974) 10

Ashwander v. Tenn. Valley Auth.,
297 U.S. 288 (1936) 4, 14

Boynton v. Virginia,
364 U.S. 454 (1960) 14

Chavez v. Martinez,
538 U.S. 760 (2003) ..... *passim*

City of St. Louis v. Praprotnik,
485 U.S. 112 (1988) 4, 13, 17

Collins v. City of Harker Heights,
503 U.S. 115 (1992) 13

Connick v. Myers,
461 U.S. 138 (1983) 10

Ex parte Curtis,
106 U.S. 371 (1882) 10

Gardner v. Broderick,
392 U.S. 273 (1968) 7, 8

Garner v. United States,
424 U.S. 648 (1976) 7

Garrity v. New Jersey,
385 U.S. 493 (1967) 6, 8

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.,
510 U.S. 27 (1993) 14

Jackson v. Denno,
378 U.S. 368 (1964) 9

TABLE OF AUTHORITIES—Continued

Page(s)

Lefkowitz v. Cunningham,
431 U.S. 801 (1977) 8

Minnesota v. Murphy,
465 U.S. 420 (1984) 6, 7

Miranda v. Arizona,
384 U.S. 436 (1966) 15, 16

Monell v. New York City Dept. of Soc. Servs.,
436 U.S. 658 (1978) 4, 12, 13, 17

Neese v. S. Ry. Co.,
350 U.S. 77 (1955) 14

Owen v. City of Independence,
445 U.S. 622 (1980) 11

Pembaur v. City of Cincinnati,
475 U.S. 469 (1986) 12, 13, 17

Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.,
467 U.S. 138 (1984) 14

Uniformed Sanitation Men Ass'n., Inc. v. Comm'r of Sanitation of N.Y.,
392 U.S. 280 (1968) 8

United States v. Kordel,
397 U.S. 1 (1970) 7

United States v. Patane,
542 U.S. 630 (2004) 16

TABLE OF AUTHORITIES—Continued

Page(s)

*United States v. Verdugo–*Urquidez, 494 U.S. 259 (1990) 3

Wood v. Georgia, 450 U.S. 261 (1981) 14

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V ..... *passim*

U.S. Const. amend. XIV 16

STATUTES

42 U.S.C. § 1983 ..... *passim*

MISCELLANEOUS

James Higdon, *Another investigation into misuse of funds adds to University of Louisville's recent turmoil*, Wash. Post (Dec. 23, 2015) https://goo.gl/XgsLvz 9

Vivian Ho, *Ex-health inspectors charged in S.F. bribe scheme*, S.F. Gate (Dec. 15, 2011), https://goo.gl/xutNZ5 10

Andrea Isom, *Ex-government employee accused of stealing more than $300K from low income residents*, WXYZ.com (Aug. 8, 2017), https://goo.gl/aqaQP9 9

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Dan Weikel, *Two San Francisco police officers convicted of theft and conspiracy*, L.A. Times (Dec. 5, 2014), https://goo.gl/JnXRBz 10

INTEREST OF AMICI[1]

The Tenth Circuit's ruling permits a damages action to proceed against the City of Hays, under 42 U.S.C. § 1983, based on the conduct of Kansas prosecutors over whom the City had no control. Permitting government employers to be held liable for damages in this situation threatens to chill *all* government employers from properly supervising their employees in the performance of their official duties.

Amici have a substantial interest in the outcome of this case because they collectively represent the nation's 90,000 State and local government employers who supervise more than 19 million workers, approximately 72% at the local level and 28% at the State level.[2]

- The National Association of Counties is the only national organization that represents the nation's 3,069 county governments.
- The National League of Cities represents the nation's 19,000 cities, towns, and villages.

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[1] In accordance with Rule 37.6, counsel for *amici* represents that no party authored any portion of this brief and no person or entity other than *amici* or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Petitioner and Respondent have consented in writing to the filing of this brief and have notified the Clerk that they consent to the filing of *amicus* briefs in support of either or neither party.

[2] United States Census, *Annual Survey of Public Employment & Payroll Summary Report: 2013*, at 1, 9 (2014), https://www.census.gov/library/publications/2014/econ/g13-aspep.html.

- The U.S. Conference of Mayors represents all United States cities with a population of more than 30,000 people, which at present includes more than 1,200 cities.
- The International City/County Management Association represents more than 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities.
- The International Municipal Lawyers Association serves as an advocate and resource for local government attorneys.
- The National Public Employer Labor Relations Association represents agencies employing more than 4 million federal, state, and local government workers in a wide range of areas.
- And the International Public Management Association for Human Resources represents over 8,000 human-resource professionals and human-resource departments at the federal, state, and local levels of government.

INTRODUCTION AND SUMMARY OF ARGUMENT

The dispute between the parties focuses on the specific juncture in a criminal case at which the Fifth Amendment right against self-incrimination requires the exclusion of a witness's compelled statement. But the real problem is that a government employer should not be liable for the admission of a statement at *any* juncture of a criminal case over which the employer has no control.

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. That right is not violated unless and until a person's compelled statement is "admitted as testimony against him in a criminal case." *Chavez v. Martinez*, 538 U.S. 760, 767 (2003) (Opinion of Thomas, J.); *id.* at 777 (Souter, J., concurring in the judgment). The Tenth Circuit held that petitioner Matthew Vogt stated a § 1983 claim for money damages against the City of Hays when Vogt's allegedly compelled statement to the City was later offered as evidence at the preliminary hearing of a criminal case, and that the bar on admission of a compelled statement "in a criminal case" includes its introduction at a preliminary hearing. Pet. App. 28a. The City, by contrast, argues that "the Fifth Amendment is 'a fundamental trial right of criminal defendants' that can be violated *'only at trial.'*" Br. 1 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990)).

The most disturbing aspect of this case, however, is that the City of Hays did not control the decision of Kansas authorities to bring criminal charges against Vogt, let alone to introduce the allegedly compelled statement in the criminal case, whether at trial or at the preliminary hearing. So even if the Court were to rule that the Fifth Amendment forbids the introduction of a compelled statement only at trial, it would not address the larger problem with the Tenth Circuit's ruling. Government employers would continue to be vulnerable to § 1983 liability based on the conduct of prosecutors over whom they have no control.

Amici suggest two alternative grounds for reversal that would better protect government employers on whom the nation depends to ensure an honest and

faithful workforce. First, the Court could hold under the *Monell* line of cases that liability under 42 U.S.C. § 1983 cannot be imposed on a municipality that does not control the decision to use an allegedly compelled statement in a criminal case. *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 694 (1978); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127-30 (1988). Although not within the question presented, a decision on this basis is warranted on constitutional-avoidance grounds. *See, e.g., Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Deciding the case based on the well-established statutory limits of § 1983 liability would allow the Court to avoid answering an unresolved constitutional question.

Alternatively, the Court could decide the case on the ground supported by six Justices in *Chavez*: that the privilege against self-incrimination entitles the holder only to the exclusion of evidence in a criminal case, not to money damages under § 1983 for the violation of prophylactic rules designed to protect the privilege. 538 U.S. at 771-72 (plurality opinion by Thomas, J., joined by Rehnquist, C.J., and O'Connor and Scalia, JJ.); *id.* at 777-79 (Souter, J., concurring in the judgment, joined by Breyer, J.); *id.* at 780 (Scalia, J., concurring in part in the judgment). Because a decision on that ground would be based on the limits of the Fifth Amendment itself, the issue is fairly subsumed within the question presented (as it was in *Chavez*).

The fundamental flaw in the Tenth Circuit's decision is that it permits liability to be imposed on a government employer for prosecutorial conduct over which the employer has no control. If not corrected, that aspect of the court of appeals' decision beckons litigation against government employers that they

cannot prevent, except by being less vigilant in rooting out employee misconduct.

ARGUMENT

I. The Tenth Circuit's decision pressures government employers to be less vigilant in discovering and correcting employee misconduct.

The decision below creates a perverse incentive to look away from employee misconduct. To see why, it is worth asking what City of Hays Police Chief Don Scheibler did wrong in his dealings with Vogt that could warrant § 1983 damages against the City.

Unbeknown to Chief Scheibler, Vogt had applied for a job with another police department and had revealed (in Vogt's guarded words) that he "kept a knife for his personal use after coming into possession of it while working as a Hays police officer." Pet. App. 48a. The prospective employer nonetheless offered Vogt a job on the condition that he tell the City of Hays about the knife. Vogt did so, which (not surprisingly) led Chief Scheibler to require that Vogt "document the facts related to his possession of the knife." Pet. App. 49a. Chief Scheibler "opened an internal investigation seeking only administrative policy violations." *Id.* Vogt says that he "wrote a vague one-sentence report related to his possession of the knife" and then promptly resigned, giving two weeks' notice to the City. *Id.* Scheibler's lieutenant followed up with Vogt during the two-week period, assuring Vogt that he was "seeking only policy violations and was not conducting a criminal investigation." *Id.* The lieutenant "elicited further information about [Vogt's] possession of the knife, including the type of police call Plaintiff was handling when he came into possession of the knife."

Pet. App. 49a-50a. That information led to "an audio recording which captured the circumstances of how [Vogt] came into possession of the knife." Pet. App. 50a.

With that new information, "Chief Scheibler requested the Kansas Bureau of Investigation to initiate a criminal investigation." *Id.* That investigation caused the other police department to withdraw Vogt's job offer. *Id.* And although criminal charges were subsequently filed against Vogt and a prosecutor offered the "compelled" statements at a preliminary hearing, the district judge found the evidence insufficient and dismissed the charges. Pet. App. 50a-51a.

What should Chief Scheibler have done differently? Vogt never claims that he was asked to waive his privilege against self-incrimination or told "that an assertion of the privilege would result in the imposition of a penalty." *Minnesota v. Murphy*, 465 U.S. 420, 438 (1984) (distinguishing *Garrity v. New Jersey*, 385 U.S. 493 (1967)). Indeed, it is hard to see what employment pressure Vogt faced from the City once he resigned. Nor does Vogt contend that Chief Scheibler had the power to cause criminal charges to be filed against him, let alone that Scheibler had any say in whether the prosecutor offered Vogt's "compelled" statements at the preliminary hearing. Yet the Tenth Circuit held that Vogt stated a § 1983 damages claim against the City, on account of Chief Scheibler's exercising final policymaking authority, based entirely on the *prosecutor*'s use of compelled statements at the preliminary hearing over which Scheibler had no control. Pet. App. 27a-28a.

There is much that is wrong with that ruling. First, even assuming that Vogt himself felt "compelled" to reveal that he had taken the knife, Chief Scheibler

could reasonably have relied on Vogt to assert his Fifth Amendment privilege if the answers might incriminate him. In a noncustodial setting like this one, answers "are not compelled within the meaning of the Fifth Amendment unless the witness is required to answer over his valid claim of the privilege." *Murphy*, 465 U.S. at 427. And an employee like Vogt is usually in the best position to know if his answers would be incriminating. *See Garner v. United States*, 424 U.S. 648, 655 (1976) ("Only the witness knows whether the apparently innocent disclosure sought may incriminate him, and the burden appropriately lies with him to make a timely assertion of the privilege. If, instead, he discloses the information sought, any incriminations properly are viewed as not compelled.").

"Without question," Vogt—a police officer presumably well acquainted with his own constitutional rights—"could have invoked his Fifth Amendment privilege against compulsory self-incrimination." *United States v. Kordel*, 397 U.S. 1, 7 (1970). Since he "revealed incriminating information instead of timely asserting his Fifth Amendment privilege, his disclosures were not compelled incriminations." *Murphy*, 465 U.S. at 440.

Second, Vogt was questioned only with regard to the performance of his official duties. This Court in *Gardner v. Broderick* distinguished between *proper* questions related to performance of the employee's official duties, and an *improper* insistence that the employee waive his Fifth Amendment rights:

> If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, *without being required to waive his immunity* with respect to the use of his

> answers or the fruits thereof in a criminal prosecution of himself, *the privilege against self-incrimination would not have been a bar to his dismissal.*

392 U.S. 273, 278 (1968) (emphasis added, citation omitted).

That distinction is crucial. Government employers must be permitted to question employees relating to the performance of their public duties because it effectuates "the important public interest in securing from public employees an accounting of their public trust." *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977).[3] That principle should have protected what Chief Scheibler did here. He asked Vogt specific questions about the knife that Vogt himself had brought to the chief's attention. He did not ask Vogt to waive his Fifth Amendment immunity.

Third, even assuming for argument's sake that Vogt's statements to the City were deemed "compelled" under an implied threat of losing his job, City officials could reasonably believe that his statements would not be used in any criminal case, either because the prosecutor would decline to offer that evidence (knowing it would be inadmissible under *Garrity*), or because Vogt could successfully move to suppress

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[3] *See also id.* ("Public employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity."); *Uniformed Sanitation Men Ass'n., Inc. v. Comm'r of Sanitation of N.Y.*, 392 U.S. 280, 285 (1968) ("[P]etitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights.").

it. *See Jackson v. Denno*, 378 U.S. 368, 395 (1964) (holding that "a proper determination of voluntariness [must] be made prior to the admission of the confession to the jury which is adjudicating guilt or innocence").

But the most glaring problem with letting a § 1983 case proceed against the City on these facts is that the City itself had no control over the prosecutor's decision to use Vogt's statements in the criminal case. Imposing liability on a government employer for the conduct of a prosecutor over whom it has no control significantly threatens to chill government employers from exercising prudent oversight in the workplace.

It is not hard to find real-world examples of misconduct that government employers should be encouraged to root out, not ignore. Recent events reflect reports of:

- employees charged with stealing government property or embezzling public funds;[4]
- public school teachers inappropriately touching their students;[5]
- university professors misappropriating grant moneys;[6]

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[4] *See* Andrea Isom, *Ex-government employee accused of stealing more than $300K from low income residents*, WXYZ.com (Aug. 8, 2017), https://goo.gl/aqaQP9.

[5] *See* Bill Lukitsch, *Richmond Public Schools substitute teacher accused of inappropriately touching children*, Richmond Times-Dispatch (June 15, 2017), https://goo.gl/VdHkC4.

[6] *See* James Higdon, *Another investigation into misuse of funds adds to University of Louisville's recent turmoil*, Wash. Post (Dec. 23, 2015), https://goo.gl/XgsLvz.

- public health inspectors taking bribes;[7] and
- police officers stealing property from crime scenes.[8]

Although the vast majority of government employees are honest, good governance requires supervisory vigilance. Government employers are in the best position to discover malfeasance and corruption. They should not be made to think twice before looking into misconduct for fear of being sued if an employee's statement is later used by prosecutors in a criminal case. Nor should they be chilled from reporting transgressions that they have discovered to the police. *See Connick v. Myers*, 461 U.S. 138, 150-51 (1983) (noting "the government's legitimate purpose in 'promot[ing] efficiency and integrity in the discharge of official duties, and . . . proper discipline in the public service' ") (quoting *Ex parte Curtis*, 106 U.S. 371, 373 (1882)); *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring in part and concurring in the result in part) (stating that "maintenance of employee efficiency and discipline . . . [is] essential if the Government is to perform its responsibilities effectively and economically," and "the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial").

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[7] *See* Vivian Ho, *Ex-health inspectors charged in S.F. bribe scheme*, S.F. Gate (Dec. 15, 2011), https://goo.gl/xutNZ5.

[8] *See* Dan Weikel, *Two San Francisco police officers convicted of theft and conspiracy*, L.A. Times (Dec. 5, 2014), https://goo.gl/JnXRBz.

Qualified immunity will not ameliorate the chilling effect. For one thing, municipalities do not have qualified immunity. *Owen v. City of Independence*, 445 U.S. 622, 657 (1980). Thus, under the Tenth Circuit's ruling, municipalities are "strictly liable under § 1983," *id.* at 669 n.10 (Powell, J., dissenting), if a statement elicited by a final policymaker from an employee is deemed "compelled" and later used by a prosecutor in a criminal case.

And although State and local officials enjoy qualified immunity from individual damage claims, that protection will not be enough to negate the chilling effect either. The Tenth Circuit held that the individual officers investigating Vogt had qualified immunity because the law was not clearly established that his compelled statement was inadmissible at the preliminary hearing. Pet. App. 21a-24a. But the chilling effect arises without regard to *when* in a criminal proceeding the employee's statement is offered. It arises because the employer generally has no control over *whether* a prosecutor will later use the allegedly compelled statement at all. A rule allowing an employee to sue his employer for damages if his admission is later used in a criminal proceeding chills employer vigilance regardless of when in a criminal case a prosecutor might offer it.

Government employers and supervisors must not be frightened by the prospect of § 1983 liability from responsibly investigating their suspicions of employee misconduct. They should be encouraged instead to ferret out corruption, to safeguard the public health, and to protect the public fisc.

II. The Court should make clear that government employers are not liable for the decisions of prosecutors over whom they have no control.

The Court's opinion in this case should address the serious chilling effect described above. The Court should make clear that government employers are not liable under § 1983 for the decisions of prosecutors over whom they have no control. *Amici* suggest two alternative grounds of decision that would directly solve this problem.

A. Municipal liability cannot be imposed under § 1983 because the City of Hays did not control the prosecutorial decision to use Vogt's statement in the criminal case.

The Court could rule that the City of Hays cannot be liable for violating Vogt's Fifth Amendment rights because the City was not responsible for the prosecutor's decision to use the compelled statement in the criminal proceeding. Section 1983 does not permit vicarious liability to be imposed on municipalities. *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 691 (1978). "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or *by those whose edicts or acts may fairly be said to represent official policy*, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694 (emphasis added). In other words, liability may not be imposed on municipalities on the theory that they failed "to control the conduct of *others*." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986).

Yet in this case, the Tenth Circuit allowed the § 1983 case to go forward against the City based on "the conduct of *others*," *id.*, namely, the prosecutor who introduced Vogt's allegedly compelled statement at the preliminary hearing. Municipal liability would be permissible here only if the prosecutor himself were clothed with final policymaking authority on the City's behalf. *Cf. Pembaur*, 475 U.S. at 484-85 (imposing municipal liability where the county prosecutor "was acting as the final decisionmaker for the county"). But Vogt does not claim that the prosecutor was even employed by the City, let alone that he acted as its final policymaker.

The Tenth Circuit thus plainly misapplied *Monell* by asking if Chief Scheibler "knew or reasonably should have known" that Vogt's statement might be used by a prosecutor in a later criminal case. Pet. App. 27a. That sidestepped the critical test for municipal liability because it cannot "be fairly said that the city *itself* is the wrongdoer." *Collins v. City of Harker Heights*, 503 U.S. 115, 122 (1992) (emphasis added). Nor did Vogt plead any facts to show that the City ratified the prosecutor's decision to use the compelled statement. That would require a showing that the City approved not only the prosecutor's decision but also "the [unconstitutional] basis for it." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988).

Although this issue admittedly is not subsumed within the question presented, the Court may properly resolve the case on this narrow statutory ground in order to avoid deciding what remains an unresolved question under the Fifth Amendment. Indeed, this case is a prime candidate for the constitutional-avoidance canon: "The Court will not pass upon a constitutional question although properly presented

by the record, *if there is also present some other ground upon which the case may be disposed of.*" *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (emphasis added); *see also Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint, however, that this Court will not reach constitutional questions in advance of the necessity of deciding them.").

The absence of a valid basis for municipal liability under § 1983 is clear in the record and warrants deciding the case on that limited, non-constitutional ground. In doing so, the Court would simply follow what it once described as "the traditional practice of this Court of refusing to decide constitutional questions when the record discloses other grounds of decision, whether or not they have been properly raised before us by the parties." *Neese v. S. Ry. Co.*, 350 U.S. 77, 78 (1955) (per curiam).[9]

B. The sole and exclusive remedy for the alleged violation is the exclusion of the compelled statement.

Alternatively, the Court could decide the case by holding that Vogt's sole remedy is the exclusion of the

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[9] *See also Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 33 (1993) (per curiam) (stating that the Court may decide "a case on nonconstitutional grounds even though the petition for certiorari presented only a constitutional question") (citing *Boynton v. Virginia*, 364 U.S. 454, 457 (1960); *Neese*, 350 U.S. at 78); *see also id.* ("And we may. . . 'consider a plain error not among the questions presented but evident from the record and otherwise within [our] jurisdiction to decide.' ") (citing *Wood v. Georgia*, 450 U.S. 261, 265 n.5 (1981); R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* § 6.26 (6th ed. 1986)).

allegedly compelled statement in his criminal case and that he is therefore *not* entitled to pursue a money damages claim against the City. Indeed, this understanding of the privilege against self-incrimination garnered the votes of six Justices in *Chavez v. Martinez*, 538 U.S. 760 (2003).

Although the plurality in *Chavez* concluded that no Fifth Amendment violation occurred because the unwarned statement was not introduced in a criminal case, 538 U.S. at 767 (Opinion of Thomas, J.), Justice Thomas—joined by Chief Justice Rehnquist and Justices O'Connor and Scalia—agreed that a § 1983 claim cannot be brought for violating judge-made prophylactic rules intended to protect the self-incrimination privilege at trial:

> Rules designed to safeguard a constitutional right, however, do not extend the scope of the constitutional right itself, just as violations of judicially crafted prophylactic rules do not violate the constitutional rights of any person. . . . Accordingly, Chavez's failure to read *Miranda* warnings to Martinez did not violate Martinez's constitutional rights *and cannot be grounds for a § 1983 action*.

Id. at 772 (emphasis added).

Justice Souter agreed, joined by Justice Breyer, writing that a § 1983 damages action could not be used to remedy a *Miranda* violation because it was not "necessary to expand protection of the privilege against compelled self-incrimination to the point of the civil liability" requested there. *Id.* at 778 (Souter, J., concurring in the judgment). Permitting a § 1983 damages claim for the failure to give a *Miranda* warning would pose a "risk of global application in every instance of

interrogation producing a statement inadmissible under Fifth and Fourteenth Amendment principles, or violating one of the complementary rules we have accepted in aid of the privilege against evidentiary use." *Id.* They correctly saw "no limiting principle or reason to foresee a stopping place short of liability in all such cases." *Id.* at 779.

Justice Scalia treated the various opinions on this point as a holding of the Court:

> Section 1983 does not provide remedies for violations of judicially created prophylactic rules, such as the rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), *as the Court today holds*; nor is it concerned with "extensions" of constitutional provisions designed to safeguard actual constitutional rights.

Id. at 780 (Scalia, J., concurring in part in the judgment) (citations omitted, emphasis added).

Accordingly, the Court should rule that Vogt's sole remedy under the Fifth Amendment was the exclusion of his allegedly compelled statement—even assuming it was inadmissible at the preliminary hearing—and that Vogt therefore failed to state a claim against the City under § 1983 for money damages. A decision on this ground would comport with the Court's "continued insistence that the closest possible fit be maintained between the Self-Incrimination Clause and any rule designed to protect it." *United States v. Patane*, 542 U.S. 630, 640-41 (2004) (Opinion of Thomas, J.). Because "'[t]he exclusion of unwarned statements . . . is a complete and sufficient remedy,'" *id.* at 643 (quoting *Chavez*, 538 U.S. at 790 (Kennedy, J., concurring in part and dissenting in part)," the § 1983 damages claim must fail.

This alternative ground for decision is subsumed within the question presented, just as it was in *Chavez*. The question on which the Court granted review, as in *Chavez*, concerns the scope and application of the Fifth Amendment. A holding that the exclusion of evidence is a "complete and sufficient remedy" to effectuate the privilege against self-incrimination—and that a § 1983 damages claim is therefore not available—is fairly subsumed within the scope of that question.

* * *

The larger problem in the Tenth Circuit's ruling is not its holding that the self-incrimination privilege requires the exclusion of compelled statements at a preliminary hearing, but that a government employer can be held liable for money damages under § 1983 for the decision of a prosecutor over whom it has no control. That ruling is plainly wrong. As a matter of established § 1983 jurisprudence under *Monell*, *Pembaur*, and *Praprotnik*, the City cannot be liable for the actions of a prosecutor who does not exercise final policy-making authority on the City's behalf. And under *Chavez*, the remedy for the Fifth Amendment violation (if any) would be the exclusion of evidence in the criminal case, not a money damages claim against the City.

The Court should adopt one of those alternative grounds for decision in order to eliminate the chilling effect on government employers from a decision that makes them responsible for the conduct of prosecutors over whom they have no control. On behalf of the nation's State and local government employers, *Amici* urge the Court, at a minimum, to make clear that these defenses remain available to government employers.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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